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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 71

JAMES RICHARD PETERSON, ET AL.,
PETITIONERS,

vs.

CITY OF GREENVILLE

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF SOUTH CAROLINA

PETITION FOR CERTIORARI FILED FEBRUARY 26, 1962
CERTIORARI GRANTED JUNE 25, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

CITY OF GREENVILLE, Respondent,

against

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT and ROSE MARIE COLLINS, Appellants.

APPEAL FROM GREENVILLE COUNTY

HONORABLE JAMES H. PRICE, SPECIAL COUNTY JUDGE

Transcript of Record

[fol. 1]

IN THE SUPREME COURT OF SOUTH CAROLINA

STATEMENT

The ten (10) appellants, all of whom are Negro high school students, were arrested on August 9, 1960, and charged with violating Act No. 743 (R896, H2135) Acts and Joint Resolutions of the General Assembly of South Carolina for 1960, Trespass after Notice.

Appellants were tried before Greenville City Recorder John V. Jester of Greenville, South Carolina, without a jury on August 11, 1960. Evidence presented was that the appellants seated themselves at the lunch counter of S. H. Kress and Company in Greenville and were thereafter requested to leave by the Manager. S. H. Kress and Company does not serve Negroes at the lunch counter of its Greenville store although Negroes are welcome to do business in all other departments thereof. Also, there is an

ordinance which prohibits Negroes and white persons from being served in the same restaurant at the same time. The management requested appellants to leave, it having been announced that the lunch counter was closed. The closing of the lunch counter was because of the presence of appellants. Upon their refusal to leave, appellants were thereupon arrested and charged with the offense of trespass after notice. At the conclusion of all of the evidence, Judge Jester found each of the appellants "guilty" and sentenced each of them to pay fines of One Hundred ($100.00) Dollars or serve thirty (30) days in prison.

Notice of Intention to Appeal was duly served upon the City Recorder.

Thereafter, the matter was argued before Honorable James H. Price, Special Judge, Greenville County Court.

On March 17, 1961, Judge Price issued an Order, affirming the judgment of the City Recorder.

[fol. 2] Notice of Intention to Appeal was thereupon duly served upon the City Attorney.

Proceedings Before City Recorder

Judge Jester: Mr. Arnold, is the city ready?

Mr. Arnold: Yes.

Judge Jester: Mr. Perry, defendants ready?

Mr. Smith: I would like to make a motion.

Judge Jester: Mr. Arnold, before we get into this I would like this man to move off the front row. I want to bring the defendants and put them on the front row. Are the defendants we have here? James Richard Peterson, is he here? Come around, James, and have a seat, James Carter, David Ralph Strawder, Frank G. Smith, Robert Crockett, Joan Yvonne Eddy, Helen Angela Evans, Harold James Fowler, Doris Wright and Rose Marie Collins. All of these defendants, Mr. Smith and Mr. Perry, are charged with trespassing after warning in violation of Act of 1960, number R896 H2135 of the state code of South Carolina. Do they plead guilty or not guilty?

Mr. Smith: Before we take the plea, Your Honor, we would like to make a motion to precede that, please?

Judge Jester: We will be glad to hear you on the motion.

Motion to Quash Information and Dismiss Warrant and Denial Thereof

Mr. Smith: At this time, on behalf of all these defendants, Your Honor, we make a motion to quash the information and dismiss the warrant on the grounds that as stated, the charge is too indefinite and uncertain as to apprise these defendants of what they are actually being charged with. We feel that under the court merely to state the act charged under, and for trespassing is not enough, there should be some more under, these defendants are [fol. 3] not properly apprised of what they are actually being charged with under this warrant as drawn here.

Judge Jester: Anything further, Mr. Smith?

Mr. Smith: No, sir it's just too indefinite and uncertain.

Judge Jester: Anything, Mr. Perry?

Mr. Perry: May I just add one sentence to the motion and that is, that the defendants are entitled under the Constitution of the State of South Carolina to be fully informed of the nature of the charge against them and to require them to got to trial on a warrant which is so vaguely and indefinitely phrased is to deprive them of liberty without due process of law, as protected under the 14th Amendment to the United States Constitution, and under the South Carolina Constitution.

Judge Jester: Anything further?

Mr. Perry: No, sir.

Judge Jester: Any reply, Mr. Arnold?

Mr. Arnold: No, sir, Your Honor, I think the warrant is sufficiently definite, it refers to the number of the Act. The Act hasn't come out in bound volumes yet, as opposing counsel knows, but it's referred to the number and the date and I think it states trespass after notice and that's substance of the act.

Judge Jester: I overrule your motion, Mr. Smith and Mr. Perry. Now then, we have these defendants charged as I so stated and my next question. Do they plead guilty or not guilty?

PLEA

Mr. Smith: All of the defendants plead not guilty.

Judge Jester: And I understand that by agreement the city and counsel for the defendants have agreed to try all of these cases at one time?

Mr. Smith: That is correct.

STATE OF SOUTH LINA
COUNTY OF GR VILLE

MUNICIPAL COURT
CITY OF GREENVILLE

THE CITY

vs.

Peterson, James Richard
LAST FIRST MIDDLE
Defendant

ARREST AND/OR TRIAL WARRANT

No. 5330

Offense Trespassing After Warning, Act. of 1960 No. R896, H2135, of the State of South Carolina

Bond Required $100.00

Bond Posted $

Recognizance ☐ Cash ☐

By

DATE SET FOR TRIAL

8 AM Aug 10 19 60

Attorney for defendant

MOTIONS

TRIAL WARRANT

No. ~~5625~~ 5330

STATE OF SOUTH CAROLINA } MUNICIPAL COURT
COUNTY OF GREENVILLE } CITY OF GREENVILLE

[fol. 3a]

PERSONALLY comes before me deponent who makes oath that upon information and belief in this State and County and within the Limits of the City of Greenville on the 9th day of Aug, 1960, the defendant James Richard Peterson C/M did commit the offense of Trespassing After Warning Act. of 1960 No R896, H2135 of the State of South Carolina, approved by the Governor May 14, 1960

All of which is against forms of the ordinances made and provided for, and against the peace and dignity of the City of Greenville; and that

are witnesses for the City, and that defendant did commit said offense in the view of deponent, whereupon deponent, a police officer, did arrest defendant.

s/G.C. Bramlette

Sworn to before me this 9th day of Aug. A. D. 1962

(See reverse side if not an On-View Arrest)

s/ J. E. Meddlelor (L.S.)
Notary Public for South Carolina
Recorder, Municipal Court

Name Peterson, James Richard
LAST FIRST MIDDLE

Alias

Bond Required $100.00

Bond Posted $

Recognizance ☐ Cash ☐

By

DATE SET FOR TRIAL

8 AM Aug 10 19 60

Attorney for defendant

MOTIONS

VERDICT

Recorder Foreman

JUDGMENT

$ or days

this 19

Recorder

Attest:

Clerk

and against the peace and dignity of the City of Greenville; and that

are witnesses for the City, and that defendant did commit said offense in the view of deponent, whereupon deponent, a police officer, did arrest defendant.

s/G.C. Bramlette

Sworn to before me this 9th day

of Aug. A. D. 1962 (See reverse side if not an On-View Arrest)

s/ J. E. Meddlelor (L.S.)
Notary Public for South Carolina
Recorder, Municipal Court

Name Peterson, James Richard
LAST FIRST MIDDLE

Alias

Color C Age 16 Sex M Nationality Negro

Address

Cell No. 3-4 B.O.D. 10-8-43

Driver's License No. State

On-View Arrest ☐ Reported ☐ Other ☐

Officers Capt. Bramlette, Ast. Lt. Voughn, Johnson,

Date of Arrest 8-9-60 19 Time 11:43 M

Where Side Door Kress

Date of Release Time M

Witnesses

Other Information:

Desk Officer

ARREST WARRANT

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

MUNICIPAL COURT
CITY OF GREENVILLE

To the Chief of Police of the City of Greenville or any Police Officer thereof or

_____:

Arrest and bring before me, or the Presiding Recorder, the defendant charged with _____

_____

as shown on the reverse side hereof, and the witnesses for the City herein named.

Given under my hand and seal this _____ day of _____, 19____.

_____ (SEAL)
Recorder, Municipal Court

I appoint any Police Officer of the City of Greenville or _____ to execute this warrant.

_____ (SEAL)
Recorder, Municipal Court

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

Personally comes the undersigned deponent and makes oath that he arrested the defendant _____

_____

on the _____ day of _____, 19____

at _____

in the City of Greenville, State and County aforesaid.

_____

Given under my hand and seal this _____ day

of _____, 19__.

_____ (SEAL)

Recorder, Municipal Court

I appoint any Police Officer of the City of Greenville or _____

_____ to execute this warrant.

_____ (SEAL)

Recorder, Municipal Court

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

Personally comes the undersigned deponent and makes oath that he arrested the defendant _____

_____

on the _____ day of _____, 19__

at _____

in the City of Greenville, State and County aforesaid.

_____

Sworn to before me this _____

day of _____, 19__

_____ (SEAL)

Notary Public for South Carolina
Recorder, Municipal Court

(THIS SIDE TO BE USED ONLY IN REPORTED CASES—IT IS NOT TO BE USED WHERE ARREST HAS BEEN MADE BY OFFICER FOR OFFENSE COMMITTED IN HIS PRESENCE)

[fol. 4]

BEFORE THE CITY RECORDER

TRANSCRIPT OF EVIDENCE

CAPTAIN G. O. BRAMLETTE

Judge Jester: And the facts and finding of one case would be the facts and finding of all as far as the record is concerned?

Mr. Smith: That is correct.

Mr. Perry: May I make one addition, Your Honor, that in the event that the testimony should indicate that one or more of the defendants is to be treated differently, from the rest of them in terms of any judgment of Your Honor, that at such time as the evidence does develop, that state of facts, that a motion for dismissal will be proper as to the person or any other motion which might be applicable to the situation.

Judge Jester: Well, I agree with you at this time until I have heard such a motion.

Mr. Perry: Yes, sir.

Judge Jester: Now who is the first witness, Mr. Arnold?

Mr. Arnold: Captain Bramlette.

CAPTAIN G. O. BRAMLETTE, being duly sworn, testified as follows:

Direct examination.

By Mr. Arnold:

Q. Captain Bramlette, I believe you are a member of the police force of the City of Greenville?

A. That is correct.

Q. Your rank is Captain?

A. Yes, sir.

Q. How long have you been captain with the department?

A. Approximately five years.

Q. On August 9 of this year, did you receive a call from Kress Five and Ten Cent Variety Store?

[fol. 5] A. I had a call, I do not know where it come from Kress or not.

Q. You had a call?

A. Yes, sir.

Q. As a result of that call where did you go?

A. To Kress' Five and Ten Cent Store on South Main St.

Q. Where were you when you received the call?

A. In Police Headquarters.

Q. Did anyone accompany you?

A. Yes, sir.

Q. Who?

A. I went in patrol car 9 with Officers Berry and Wall.

Q. About what time was it you received the call?

A. 11:18 a. m.

Q. All right, when you got to Kress' on South Main St., did you find any of the defendants?

Mr. Perry: Your Honor, may I interpose a slight objection to Mr. Arnold's methods. I believe that his questions tend to be leading and if he would kindly rephrase it so as to let the witness testify as to what he found, I don't believe it would be objectionable.

Q. When you arrived at Kress' Store, did you go into the store?

A. I did.

Q. What did you find in the store, and I direct your attention to the lunch counter?

A. I met Officer Vaughan at the side door on McBee Avenue, he and I and several other officers entered the store. On arriving inside the store at the lunch counter which is located right rear of Kress, Officers, State Agents Hillyer and Morris were there and at the lunch counter we noticed these defendants along with four more. There [fol. 6] were fourteen sitting at the lunch counter, the other four are juveniles.

Q. You saw these ten defendants, did you or not?

A. I did.

Q. And they were doing what?

A. They were sitting at the lunch counter.

Q. Sitting at the lunch counter? Now you mentioned two SLED Agents, Mr. Hillyer and Mr. Morris. Were they in the store when you arrived?

A. They were.

Q. All right. Do you know Mr. G. W. West?

A. I do.

Q. What position, if any, does he hold with the Kress Store?

A. He's manager of the Kress Store.

Q. Was Mr. West, or not, in the store when you arrived?

A. He was.

Q. Approximately where was he?

A. He was at the rear, at the lunch counter.

Q. Did he make any statement to these ten defendants?

A. He did.

Q. What did he say?

A. He announced that the lunch counter was being closed and would everyone leave the store.

Q. Would everyone leave the store?

A. Yes.

Q. Did these ten defendants, or any one of them, leave the store?

A. They did not.

Q. Did they, were they standing or sitting when this request was made?

A. They were sitting.

[fol. 7] Q. Did they or not continue to sit?

A. They continued to sit.

Q. All right. What, if anything, did you do?

A. After a reasonable length of time we announced that they were all under arrest.

Q. Did you transport them to headquarters?

A. We had a patrol car outside and we carried them out the side door of Kress, we carried the girls first and put them in the patrol car and brought them to police headquarters.

Q. All right, sir, when they were brought to headquarters

is it, or not, customary to remove any personal effects, such as money, or knife or watch from a prisoner?

A. It is customary.

Q. All right, was that done in this case with respect to these ten defendants?

A. It was.

Q. All right, what amount of money, if any, was found on the person of Doris Wright?

A. Twenty-four cents.

Q. On Helen Evans?

A. Thirty-one cents.

Q. James Carter?

A. No money.

Q. Robert Crockett?

A. No money.

Q. Rose Marie Collins?

A. No money.

Q. Yvonne Eddy?

A. One dollar.

Q. James Richard Peterson?

A. One dollar and ninety-one cents.

[fol. 8] Q. David Ralph Strawder?

A. One dollar and eleven cents.

Q. Harold James Fowler?

A. None.

Q. Frank G. Smith, Jr.?

A. Five dollars and fifty-five cents.

Q. I believe that bond was posted for these defendants?

A. It was.

Q. When they were discharged under the bond, under their bonds, was the money and any other personal effects returned to the defendants?

A. State that again.

Q. When they were discharged under the appearance bond, this money that had been taken from the defendants, was it returned to the defendants?

A. It was.

Mr. Arnold: Witness with you.

Cross examination.

By Mr. Matthew J. Perry:

Q. Captain Bramlette, as I understand, you are a captain on the Greenville Police Force for five years?

A. Approximately five years, yes, sir.

Q. I see, and of course, were you also employed on the Greenville City Police Force prior to that time?

A. That's correct.

Q. I see. As captain are you chief of the police, or not?

A. No, my position is in charge of one platoon.

Q. I see. Now, sir, I believe that you indicated that on the 9th of August you were at headquarters and received a call to go to Kress' 5 and 10¢ Store?

A. That is correct.

[fol. 9] Q. Do you know who made the call?

A. I do not know who called police headquarters but my radio and telephone man informed me.

Q. I see. And I believe you said that you and Officer Vaughn went into the store together, you having met him?

A. Along with two or three others.

Q. What did you expect to find when you went to Kress?

A. I was told by Officer Mann who is my communications officer, there were a number of colored young boys and girls sitting at the lunch counter at Kress'.

Q. I see. Does Greenville have an ordinance against conduct of this sort?

A. We do.

Q. What is the ordinance, please?

Mr. Arnold: I don't see that's relevant, they're not charged under any segregation ordinance of the city.

Judge Jester: On the state law, am I right, Mr. Perry?

Mr. Perry: Judge Jester, if I may, sir, whatever it was that prompted Captain Bramlette to go to Kress' upon being informed that Negroes were sitting at the lunch counter, I think is relevant. In other words, he must have been conscious of some law because after all, he's a law enforcement officer and I respectfully submit that

I'm entitled to ask him on cross examination what law he was purporting to proceed upon.

Judge Jester: Your question was, does the City of Greenville have a law pertaining to this particular offense? All right, I'll let him answer it.

Mr. Perry: Thank you. Does the City of Greenville have such a law, Captain Bramlette?

A. They do.

[fol. 10] Q. What is that law, please, sir?

A. It forbids colored and white eating at the same lunch counter.

Q. I see.

Mr. Perry: Your Honor, would you indulge me a moment, please, sir, I would like to look at that ordinance. I won't take but a moment. I did not know that the City of Greenville had such an ordinance.

(Discussion off the record.)

By Mr. Perry:

Q. Now, Captain Bramlette, as you answered this call to go to Kress', then you had the City Ordinance in mind which required separation of races in restaurants and eating places in the City of Greenville?

A. I did not.

Q. Yet you knew of the existence of such law?

A. I did.

Q. And as a Captain of the Greenville City Police Force, you did not have this ordinance in mind when you went to investigate?

A. I had the recently passed State law in mind.

Q. I see. Did the caller identify the race of the persons who were sitting at the lunch counter?

Mr. Arnold: That would be hearsay.

Judge Jester: What was the question?

Mr. Arnold: He asked the caller identify the race.

Mr. Perry: I agree it would be hearsay.

By Mr. Perry:

Q. All right, sir, now, when you went—as you answered the call then, did you receive information that there was any violation of the public order taking place?

[fol. 11] A. I was informed by my communications officer that there was a number of colored boys and girls sitting at the lunch counter in Kress'.

Q. But there is nothing wrong with that, is there, sir?

Mr. Arnold: I don't think he has to pass on that, it's a matter of conclusion.

Judge Jester: I don't think that's in his discretion, Mr. Perry. He has the right to make the arrest and disclose later whether he's right in doing so, and I right?

Mr. Perry: If Your Honor will bear with me, I believe that as an Officer of the Law, Captain Bramlette and his associates would, of course, naturally under their interpretation of the existing law be bound to enforce law and if there was nothing wrong with their sitting there perhaps he would not have had occasion to go to make the arrest.

Mr. Arnold: May it please the Court, it's the procedure of the City that when an officer gets a call to come to a certain place it is not necessary for the caller, or the informer to state what is taking place and it's not necessary that the Officer take time to find out. If he's called to come to a certain place and he's on duty he should go there and investigate whatever may be transpiring or taking place.

Judge Jester: I think that is in substance, Mr. Perry, the attitude of the officer when they are on call because they could explain it had been a man killed or a man beating his wife and forty other things there before you went to see what was happening. I think possibly the main thing to do is get there and find out what's going on.

Mr. Perry: Thank you.

[fol. 12] By Mr. Perry:

Q. Then, Captain Bramlette, when you arrived at Kress' and saw these young people sitting at the lunch counter, were they orderly?

A. They were.

Q. Were they talking among each other?

A. Some of them were talking.

Q. Could you hear them talking?

A. I could not repeat a thing that was said, I may have heard their voices.

Q. Did any of them use any profanity?

A. I did not hear any.

Q. Were they well dressed?

A. All were neat in appearance.

Q. Neat in appearance, did you ascertain that they were clean?

Mr. Arnold: I don't see that's relevant. We're not raising any question on that. He said they were neat in appearance and they were orderly. The specific charge is under the State Law and whether a person's hands are clean or a little dirty is not relevant in a case like this.

Mr. Perry: I think if the Captain knows he certainly may testify to it on Cross Examination.

Judge Jester: I'll let him answer, Mr. Arnold.

The Witness: State the question again.

By Mr. Perry:

Q. Would you say in your opinion that they were clean or dirty?

A. They were clean.

Q. So there was nothing about their persons of an unoffensive character, was it, in terms of neatness and cleanliness?

A. That's correct.

[fol. 13] Q. Now, Captain Bramlette, you've been a citizen of Greenville for quite some time?

A. That's correct.

Q. Have you had occasion to go in and out of Kress' Five and Ten Cent Store before?

A. Very few occasions.

Q. Have you been in and out of the place of business enough to know anything about its policy of serving the public?

A. I've been there numerous occasions but not, I would say, I would.

Q. Does Kress' Five and Ten Cent Store generally serve members of the public in its various departments without regard to race?

Mr. Arnold: I don't see that that's relevant.

Judge Jester: Well, in this particular case it isn't, Mr. Arnold. I think what he is getting at and getting in the record is whether or not the store that's open is selling merchandise of any and all kinds and items to the public. That's the purpose for the question, am I right?

Mr. Perry: All right.

Judge Jester: I'll let him answer yes or no.

The Witness: Yes.

By Mr. Perry:

Q. Kress' Five and Ten Cent Store, I believe, is a rather large variety store, is it not?

A. Yes.

Q. Then it has many departments, hasn't it?

A. Yes.

Q. I believe it sells some aspects, clothing and various trinkets and all of the items that are usually sold in the stores such as Kress', that is a variety store.

A. That is correct.

[fol. 14] Q. Now, let's go for a moment, please to the lunch counter in Kress'. I believe Kress' in Greenville does have a lunch counter, does it not?

A. That's correct.

Q. And at that lunch counter members of the public are served, aren't they?

A. That's correct.

Q. Except that, I believe, withdraw that question—what is the policy of Kress', if you know, sir, with regards to serving members of the Negro public at its lunch counter?

A. The policy of Kress', I'd rather for the manager of Kress' to answer that.

Q. That's quite all right, I have no intention to tax you with an unpleasant answer. Then as you saw these young, neat, clean and unoffensive colored people, what was it then

that made you, as a law enforcement officer of the City of Greenville, go into operation?

A. Under the State Law just passed by the Governor relative to sit-down lunch counters in Greenville, I enforced this order.

Q. But the State Law that just passed and signed by the Governor in May doesn't mention anything about Negroes sitting at lunch counters, does it?

A. It mentions sit-ins.

Q. Perhaps you would like to refresh your mind for a moment?

A. I was wrong, it doesn't mention sit in.

Q. Thank you, sir. So that that particular statute didn't indicate any course of action on your part at that time, did it, sir?

A. Not until after I arrived.

Q. And after you arrived there, what did the statute indicate that you should do?

[fol. 15] A. We arrested them and made a case, trespassing after warning.

Q. Who were they warned about?

A. Mr. West, the manager of Kress'.

Q. What was the substance of this warning?

A. State that again.

Q. I would just like to know what was the warning that you said was made.

A. He announced that the lunch counter was being closed and would everyone leave.

Q. I see. Did I understand on your Direct Examination that he said "everyone leave the place"?

A. This lunch counter, I do not know. I think he said the lunch counter was closed.

Q. I see. Now this was, I believe, 11:18 in the morning or shortly thereafter?

A. That's when I received the call.

Q. I see. August 9, I believe, was on a Tuesday, wasn't it?

A. That's correct.

Q. Now, could you, sir, tell me what time business places in Greenville normally close?

A. Between five and six o'clock in the evening.

Q. I see, those hours of opening and closing are more or less regulated not by law but by mutual consent, regulated by the Chamber of Commerce, aren't they?

A. I would imagine individual stores decide when they will open and close.

Q. But isn't it a fact that most stores open and close about the same time in Greenville?

A. That's correct.

Q. So that there is some uniformity, either by agreement or som how, among the store owners that they open, they [fol. 16] close the stores at a certain time, and close at a certain time?

A. I couldn't answer that.

Q. Well, now, sir, as a member of the public and also a member of the Greenville City Police Force don't you have knowledge that the places of business in Greenville are closed at a certain time?

A. I'm sure they have a certain time to close.

Q. And you have just now stated that Kress' ordinarily closes around five or six o'clock?

A That's correct. Most of the time, I think, Friday night they stay open later.

Q. All right, sir. Now, why do you suppose they closed at that time?

Mr. Arnold: I don't think it's up to him to answer that question.

Judge Jester: I think this was a call to the police department, Mr. Perry; for an officer and I believe that the manager of the store will be in better position to answer that question, than the officer as to why he closed, am I right?

Mr. Perry: Thank you, sir. May I ask, is the manager of the store in the Courtroom?

Mr. Arnold: He's in the Courtroom and will be put on the stand.

By Mr. Perry:

Q. Did the manager of Kress', did he ask you to place these defendants under arrest, Captain Bramlette?

A. He did not.

Q. He did not?

A. No.

Q. Then why did you place them under arrest?

A. Because we have an ordinance against it.

[fol. 17] Q. An ordinance?

A. That's right.

Q. But you just now testified that you did not have the ordinance in mind when you went over there?

A. State law in mind when I went up there.

Q. And that isn't the ordinance of the City of Greenville, is it?

A. This supersedes the order for the City of Greenville.

Q. In other words, you believe you referred to an ordinance, but I believe you have the State Statute in mind?

A. You asked me have I, did I have knowledge of the City ordinance in mind when I went up there and I answered I did not have it particularly in my mind, I said I had the State ordinance in my mind.

Q. I see and so far this City ordinance which requires separation of the races in restaurants, you at no time had it in mind, as you went about answering the call to Kress' and placing these people under arrest?

A. In my opinion the State law was passed recently supersedes our City ordinance.

Q. I think, sir, that you may be somewhat off on that but we won't belabor the issue, because His Honor, I believe, can make a proper ruling on that. But my question, I don't want to seem repetitious but I don't believe I got a direct answer to it. So once more, sir, you did not have the Greenville ordinance which requires separation of the races in mind when you placed these defendants under arrest?

Mr. Arnold: Now, he's answered that three times.

Judge Jester: I think that one more firm answer, Captain, would suffice the record.

[fol. 18] The Witness: I had the State ordinance in mind.

By Mr. Perry:

Q. Now, Captain, I still don't want to belabor but Your Honor, I respectfully submit the answer was not responsive. I believe he is capable of a yes or no answer.

A. I had the act that was passed May of this year in my

mind an act which "provides for the offense of trespassing after warning with penalty thereafter—"

Mr. Arnold: No need to read it.

Mr. Perry: All right, sir. And do I understand that you did not have the Greenville City ordinance in mind, sir?

A. We have all ordinances in mind when we answer the call to go anywhere.

Q. But you just now admitted you didn't have this one in mind, Captain?

A. I didn't have it in mind?

Q. I seem to recall that you said it.

A. I have all ordinances in mind.

Q. So now, as I understand, you change your testimony to say that you now have this ordinance in mind?

A. I am not saying I had it in mind, I said this supersedes our City ordinance. This is the one I was acting under.

Q. And the manager of Kress' did not at any time ask you to place these defendants under arrest, did he?

A. He did not.

Q. Yet you used the power of your office to place them under arrest without being requested by the manager of Kress to do so?

A. I did.

[fol. 19] Mr. Perry: Thank you, Captain Bramlette. That's all, Your Honor.

Mr. Arnold: That's all.

(Witness excused.)

Mr. G. W. West, being duly sworn, testified as follows:

Judge Jester: You are the manager of the Kress' Store?

The Witness: Yes, sir.

Direct examination.

By Mr. Arnold:

Q. Mr. West, you are the manager of the Kress Variety Store located on the east side of South Main Street, here in the City of Greenville?

A. Yes, sir.

Q. On August 9, 1960, Tuesday of this week, did Officers Bramlette and Vaughn come into your store around 11 o'clock?

A. Yes, sir.

Q. Were any people at that time seated at the lunch counter?

A. Yes, sir.

Q. Was it of both races or just one race?

A. Both races.

Q. Both races? Did you make any statement or request to the people sitting at the lunch counter?

A. Yes, sir.

Q. What?

A. We turned out the lights at the lunch counter and requested everybody to leave, that the lunch counter was closed.

[fol. 20] Q. Everybody to leave, all right, I believe you said there were some white people sitting there, also?

A. Yes, sir, I did.

Q. Did they or not, leave immediately?

A. Yes, sir, they left.

Q. All right, these ten defendants, of the Negro race, were they sitting at the lunch counter?

A. Yes, sir, they were.

Q. When you made that request?

A. Yes, sir, they were.

Q. Did they leave?

A. No, sir, they did not.

Q. How long did they stay there before being placed under arrest, would you say?

A. I would say about five minutes, I guess.

Q. About five minutes. Were you in the process or not of roping off the lunch counter?

A. Yes, sir, we had started to, we turned out the lights.

Q. I believe you testified, did you or not, that Captain Bramlette and the other officers placed these ten defendants under arrest?

A. Yes, sir. Those ten and four others.

Q. And they were escorted from the store?

A. Yes, sir, that's right.

Mr. Arnold: Witness with you.

Cross examination.

By Mr. Perry:

Q. Mr. West, how long have you been manager of Kress' in Greenville?

A. Since February 3.

Q. I see. Have you also worked for the Kress chains in other cities?

A. Yes, sir, fifteen years.

[fol. 21] Q. Fifteen years, how long have you lived in Greenville?

A. Since February 3rd.

Q. I see, and when you came into Greenville did you learn anything about the policies of the Kress Store with regard to serving members of the public?

A. Well, I knew that before I came into Greenville.

Q. I see. I believe Kress is a very large variety store, isn't it, sir?

A. Yes, sir.

Q. I believe I learned in another city that it was called a junior department store now, is that correct?

A. That is the name it's been given to it.

Q. And Kress operates in cities practically all over the United States, doesn't it?

A. Yes, sir.

Q. I believe it is one of the largest businesses of its kind in the country?

A. Well, I wouldn't say it was one of the largest ones, no.

Q. But it is certainly not one of the smaller?

A. That's right, yes, sir.

Q. Sir, what is the policy of Kress' with regard to serving members of the public in all of its numerous departments?

Mr. Arnold: I don't see the relevancy of that, Your Honor.

Judge Jester: I don't think it deals directly with trespassing after notice but I'm going to let him put it in the record, Mr. Arnold.

By Mr. Perry:

Q. Let me put it this way, sir, approximately how many departments does Kress' have?

A. Fifteen or twenty.

[fol. 22] Q. Those fifteen or twenty departments sell about how many different commodities?

A. It's hard to estimate, probably over ten thousand items.

Q. Probably over ten thousand items?

A. Yes, sir.

Q. Are all members of the public invited into the business of Kress'?

A. Yes, sir.

Q. And all members of the public, include Negro, and white, Indians and Chinese and every other nationality, do they not?

A. Yes, sir.

Q. So that Negroes are invited in Kress' to do business?

A. That's correct.

Q. And when they come in to do business of these various items, I believe, you said over ten thousand items, is it not the policy of Kress' to serve them courteously?

A. Yes, sir.

Q. Now, I believe, Kress' also has a lunch counter area?

A. That's correct.

Q. And it likewise is operated by the Kress chain?

A. Yes, sir.

Q. What is the policy of Kress' Greenville, South Carolina, store with regard to serving Negroes and whites at its lunch counter?

A. We follow local customs.

Q. Now, sir, "we follow local customs", is that orders from your headquarters?

A. Yes, sir.

Q. It is?

[fol. 23] A. Absolutely.

Q. And you understand as the manager of Kress' assigned to Greenville and possibly in other areas that it is one of the mandates of your national organization business chain to follow local custom with reference to serving members of the public?

A. That's correct.

Q. Now, what is the local custom with regard to serving Negroes and whites at your lunch counter?

A. The local custom, that we serve whites only.

Q. I see, so that members of the Negro public who may come in by invitation of your company to buy some ten thousand other articles may not purchase a cup of coffee or any other item from your lunch counter?

A. Yes, sir.

Q. That is your policy, isn't it?

A. Yes, sir.

Q. Now, on August 9 when these young people were seated at your lunch counter, what did you do first?

A. The first thing I had one of my employees call the Police Department and turn the lights off and state the lunch counter was closed.

Q. Was this a prearranged matter, so far as your office was concerned?

Mr. Arnold: Your Honor, I don't think that's competent. He can go so far but there's one question and one question only in this case, was the State Law violated? All that leads up to it, and all is nothing it's irrelevant, is to be placed in the record, as I interpret it, purely for a prejudicial standpoint when we could stay here 'til next week.

Mr. Perry: I don't believe it's our intention to stay 'til next week.

[fol. 24] Judge Jester: Your question, Mr. Perry, was this prearranged?

Mr. Perry: Yes, sir.

Judge Jester: I don't know what your next question would be.

Mr. Perry: Your Honor, if I may, it is my purpose through this line of questioning to bring out from this witness any arrangements or agreements which the manager of Kress' and or, the managers of other like businesses might have had with the Police Department or the City of Greenville, the South Carolina Law Enforcement Division, the Sheriff of Greenville County and any other law enforcement agency. And my question, which is designed to determine from this witness as to whether or not this course of

action which he followed was prearranged, is designed to lead me into that particular area.

Judge Jester: Well, I will have to rule it out, Mr. Perry. I think that the facts that appear in any particular instance would be a minor method on which he would have to make his decision. I'd have to rule that out. I think the facts in each case would be the controlling factor in what he did. I have to rule it out.

Mr. Perry: Your Honor, may I respectfully request that you reconsider that ruling in the light of the fact that here we are raising constitutional questions and there will ultimately be presented to the Court a motion based upon the unconstitutional application of the statute involved in this case, in this line of interrogation, is relevant. And in the light of that we respectfully request then a reconsideration of your ruling.

Judge Jester: I have ruled out, I will have to rule that his acts were taken on what happened at that particular [fol. 25] time, this act that presented itself at that particular instance.

Mr. Perry: All right, sir.

By Mr. Perry:

Q. Mr. West, why did you order your lunch counter closed?

A. It's contrary to local customs and its also the ordinance that has been discussed.

Q. Do I understand then further, that you are saying that the presence of Negroes at your lunch counter was contrary to customs?

A. Yes, sir.

Q. And that is why you closed your lunch counter?

A. Yes, sir, that's right.

Q. I see, and after the police had come and taken the defendants away, did you reopen your lunch counter?

A. Yes, sir.

Q. And did you reopen it by reason of the fact that the presence of the Negroes was no longer a threat to your business?

A. Yes, sir.

Q. Do you agree with the observations of Captain Bramlette that these young people were clean and unoffensive?

A. Yes, sir. I agree with him.

Q. Do you further agree that they were not profane, and not boisterous?

A. To the best of my knowledge they were not. I didn't hear any profanity.

Q. Yet you went in their presence and stated that the place was closed?

A. Yes, sir.

[fol. 26] Q. So that when you say, "not in your presence," you are taking into account the fact that they were directly in your presence?

A. Well, there were fourteen, sir, and they were spread out down the counter, and of course, I went to a group at a time. That's why I say I don't know what the others were saying at the other end when I was speaking to the ones at the opposite end.

Q. But you don't make any statement that they were only anything but orderly, do you?

A. That's correct, yes, sir.

Q. Now, I understand that they were seated, they meaning these defendants, were seated at your lunch counter approximately five minutes before they were arrested?

A. Yes, sir.

Q. And you at no time requested Captain Bramlette and the other officers to place these defendants under arrest, did you?

A. No, I did not.

Q. That was a matter, I believe, entirely up to the law enforcement officers?

A. Yes, sir.

Q. Mr. West, had you at any time conversed with Captain Bramlette or any officer of the South Carolina Law Enforcement Division concerning the anticipated presence of Negroes to your lunch counter?

Judge Jester: Don't think that's admissible, Mr. Perry.

Mr. Perry: Of course, Your Honor, has made your ruling and I do not quarrel with the Court.

Judge Jester: Thank you.

Mr. Perry: I sincerely request, Your Honor, to reconsider ruling because under my theory there is no question [fol. 27] that the line of inquiry is quite relevant to the issue.

Judge Jester: I have to rule it out, Mr. Perry.

Mr. Perry: All right, sir. Thank you, Mr. West. One other question, may I?

Mr. Arnold: Yes, sir.

By Mr. Perry:

Q. Of course, you only came to Greenville in February?

A. Yes, sir.

Q. During that period of time I would imagine you spent a great deal of time learning your own Kress' Five and Ten Cent Store?

A. Yes, sir, that's right.

Q. But have you not also had the occasion to learn something about the City in which you recently moved to?

A. Yes, sir.

Q. Do you know the policies that are followed by other businesses such as yours with regard to this same question, that is, the serving of Negroes at lunch counters?

A. You want my opinion?

Q. Not your opinion, just your knowledge of the custom?

A. My knowledge of the custom is exactly as ours.

Q. That's what I was after, sir. Let me ask you this, sir. Approximately how many people can you seat at your lunch counter?

A. About fifty-nine.

Q. Fifty-nine?

A. Yes.

Q. And do members of the public generally, those working uptown and those perhaps in town on business come into [fol. 28] your store regularly for meals around the lunch hour?

A. Yes, sir.

Q. So that your business, you do a pretty good business in serving members of the public at lunch time?

A. Fairly good, yes, sir.

Q. The service of food is a vital service being rendered by your company, isn't it?

A. Well, it's one of the services that we perform.

Q. Your company and the other companies which are performing the same services are, as a rule, you are just about feeding the public, aren't you?

A. Yes, sir.

Mr. Perry: Thank you, sir.

Mr. Arnold: That's all, thank you. That's the City's case, Your Honor.

(Witness excused.)

Mr. Perry: Your Honor, would you see fit to grant us a two- or three-minute recess?

Judge Jester: Be glad to.

(Short recess taken.)

MOTION TO DISMISS WARRANTS AND DENIAL THEREOF

Mr. Perry: May it please the Court at this time the defendants move to dismiss the warrants against them, all of which warrants charged a violation of Act Number R896, House Bill Number 2135 of the State of South Carolina, which Act was approved by the Governor on May 16, 1960. The evidence presented on the charge shows conclusively that by arresting the defendants the officers were aiding and assisting the owners and managers of Kress' Five and Ten Cent Store, in maintaining their policies of segregating or excluding service to Negroes at its lunch counter.

Mr. Arnold: Excuse me a minute, do you want this reporter to take the argument down?

[fol. 29] Mr. Perry: Yes, sir.

Judge Jester: This is a motion she's taking?

Mr. Perry: Yes, sir, that's right.

Mr. Arnold: When you start your argument if you don't want her to take it, tell her not to.

Mr. Perry: I might say that I have no argument to make on the matter, just the substance of the motion.

Mr. Arnold: All right. Thank you.

Mr. Perry: —

Judge Jester: Your last statement was aiding and assisting the owners of the store as I recall?

Mr. Perry: Yes, sir. In maintaining their policies of segregating and excluding services to Negroes at the lunch counter on the ground of racial color, in violation of the defendants' rights to due process of law, and equal protection of the laws, under the 14th Amendment to the United States Constitution. That is the motion, there will be no argument on the motion.

Judge Jester: Motion denied, Mr. Perry.

Mr. Perry: Also, may it please the Court, at this time, the defendants move to dismiss the warrant on the ground that the warrant which charges them with trespass after warning, the designation of the act being set forth in the warrant is invalid, in that the evidence establishes merely that the defendants were peacefully upon the premises of S. H. Kress & Co. Which establishment is performing an economic function invested with the public interest as customers, visitors, business guests, or invitees, and there is no basis for the charge recited by the warrant other than an effort to exclude these defendants from the lunch counters of Kress' Five and Ten Cent Store, because of their race and color. The defendants at the same time are excluded from equal service at the preponderant number of other eating establishments in the City of Sumter, I beg [fol. 30] your pardon, I'm reading from another motion so if the Court will permit me to insert the City of Greenville.

Judge Jester: I would have done the same thing myself.

Mr. Perry: Yes, sir. In the City of Greenville, South Carolina, thereby depriving them of liberty without due process of law, and equal protection of the laws secured to them by the 14th Amendment to the United States Constitution. That is the motion, there will be no argument.

Judge Jester: Motion denied, Mr. Perry.

Mr. Perry: I have a further motion, Your Honor, with reference to the constitutionality of the statute. At this time may it please the Court, the defendants move that the warrants against them be dismissed, which warrants charge the crime of trespassing after warning. The designation of the act being set forth in the warrant under which all of these defendants, who are Negroes, were arrested and charged is on the evidence unconstitutional as applied to

the defendants, in that, it makes it a crime to be on property open to the public after being asked to leave because of race or color, in violation of the defendants' rights under the due process and equal protection clauses of the 14th Amendment to the United States Constitution. That is the motion.

Judge Jester: Motion denied, Mr. Perry.

Mr. Perry: At this time, may it please the Court, the defendants move for a dismissal on the ground that under the evidence presented the City has not established by competent evidence a *prima facie* case.

Judge Jester: Motion denied, Mr. Perry.

Mr. Perry: Very good, sir.

[fol. 31] Judge Jester: That gets all the motions in the record?

Mr. Perry: Yes, sir, it does.

Mr. Smith: The defense calls as its first witness Mr. Raymond H. Carter.

Judge Jester: I didn't catch the name, Mr. Smith.

Mr. Smith: Raymond H. Carter. C-a-r-t-e-r.

Mr. Raymond H. Carter, being duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Mr. Carter, where do you live?

A. 111 Luke St., Washington Heights.

Q. In Greenville?

A. Yes, sir.

Q. How long have you lived in Greenville?

A. All my life.

Q. Are you employed here?

A. No, sir.

Q. You aren't employed?

A. No.

Q. On August 9, on or about eleven o'clock in the morning, did you have occasion to be in Kress' Five and Ten Cent Variety Store?

A. I did.

Q. On that morning were you anywhere near the lunch counter of Kress'?

A. Yes—

Q. Were you also there when the acts testified to heretofore this morning took place? You heard what has been said here already this morning?

A. No, not everything.

[fol. 32] Q. Were you there when some arrests were made of colored people sitting at the lunch counter?

A. I was.

Q. Were you there when the store was closed since you heard Mr. West testify, you heard him testify the store was closed?

A. Yes.

Q. Were you there at that time?

A. I was right there.

Q. Would you please just tell us in your own words what were your observations, what did you see and hear, during the time of the closing of that lunch counter, just give it to us in your own words?

A. Well, actually I didn't hear the manager say the lunch counter was closed, I only heard the officers and he could have said lunch counter closed but I didn't hear him. About the only thing I heard was the lunch counter was closed and you're under arrest. They didn't give the kids a chance to get up.

Q. Which officer are you referring to now, could you identify him, is he in the Court room?

A. He was the one I saw, this one, this guy right here with the paper in his hand going out the door.

Mr. Smith: May we have him identified, please.

Mr. Arnold: Mr. Hillyer.

Mr. Smith: Mr. Hillyer?

Mr. Par' : Mr. H-i-l-l-y-a-r.

Mr. Smith: I believe he is an officer of the South Carolina Law Enforcement Division, is that right?

Mr. Arnold: That is correct.

Mr. Smith: We would like the record to show your Honor that this witness pointed out Mr. Hillyer, who has

been recognized as an officer of the South Carolina Law Enforcement Division.

[fol. 33] Judge Jester: Glad to do that.

By Mr. Smith:

Q. Was that the only request that you heard for these children to leave?

A. He said lunch counter closed and the officer immediately began arrest, stand-up and line-up, you're under arrest and began searching the young men.

Q. Well, did the officer make a request that they leave?

A. No.

Q. Did you hear the request?

A. No, I didn't hear a request.

Q. Did you hear the manager, Mr. West, make a request that they leave?

A. I didn't hear Mr. West say anything, like I said before.

Q. As I understand, if such a request had been made, would they have had time to leave?

A. No.

Q. Immediately upon the statement, they were immediately placed under arrest?

A. Immediately.

Mr. Arnold: I think, Mr. Smith, you are leading the witness a little.

Mr. Smith: I'm sorry.

Judge Jester: I usually wait 'til you all object because that's not my business.

By Mr. Smith:

Q. Mr. Carter, did everyone leave the lunch counter?

A. No.

Q. Some people remained seated?

A. The white citizens.

Q. Can you identify them?

A. Well—

[fol. 34] Q. I mean as to race?

A. Yes, sir.

Q. They did not leave?

A. They didn't leave.

Q. Even after you heard the statement the lunch counter was closed?

A. Well, yes, they didn't leave.

Q. Did you observe any attempt made to arrest those white persons who refused to leave?

A. No.

Q. They were allowed to remain, that was your observation?

A. They did.

Q. Did you hear any other officer make a request?

A. Well, that one, was the only one I heard and the others I think went to his command. They all began right after he said that, searching the young men and lining them up. And I also stayed in the store and watched while they was arresting and walking out the door, the lights came back on and the whites didn't leave.

Q. They remained seated?

A. They remained seated.

Q. And is your testimony that no one made any attempt to arrest them?

A. No, sir, and I didn't see a rope to rope off the counter.

Q. You did not see a rope?

A. I did not see a rope.

Q. Did you hear anyone say "you are trespassing"?

A. I didn't hear anything about trespassing 'til they were locked up.

[fol. 25] Q. All you heard were the counter's closed and the immediately arrest even before they had, could make an attempt to get up from the stools and leave?

A. Yes, sir.

Mr. Smith: That's all.

Cross examination.

By Mr. Arnold:

Q. What is your age, please?

A. Twenty.

Q. Twenty. And you say that you are unemployed?

A. Well, at the present, yes.

Q. Are you married?
A. No.
Q. You live with your mother and father here?
A. I do.
Q. What is the last employment you had?
A. I worked for the Southern Railway, Railroad.
Q. What?
A. Mail handler for the Southern Railroad.
Q. I didn't catch the answer?
A. Mail handler.
Q. When did you leave the Southern Railroad?
A. It was the day of the accident, the wreck at Seneca. I don't recall the date.
Q. All right, did you go with these ten defendants up to Kress' Store?
A. No, I didn't. I didn't go with them, I was by myself, they was in front of me.
Q. But then you followed them?
A. Sure I followed them, that's a free street.
Q. You knew that they were going into the store?
A. Sure I knew it.
[fol. 36] Q. As a matter of fact, Mr. Carter, weren't you the leader of this group?
A. If I was the leader, I would have been arrested.
Q. I didn't ask you that.
A. Was I the leader?
Q. Yes.
A. No, I wasn't the leader.
Q. Before Officer Bramlette and Vaughn and some of the others arrived on the scene, weren't you going up and down the line where these ten defendants were sitting, talking with them?
A. Sure, I know 'em.
Q. But you didn't sit down?
A. No, I didn't.
Q. I want to ask you when you saw Captain Bramlette and some of the other officers come into the store, you kind of made yourself scarce, so to speak?
A. I was right there, they didn't see me, but I saw them.
Q. But you moved away from the vicinity of the lunch counter?

A. No, I didn't.

Q. But you didn't sit down?

A. I didn't sit down.

Q. Where were you standing when the officers were there?

A. Right next to another counter observing.

Q. Well, why couldn't the officers see you, you said they didn't see you?

A. Well, at that time, they marched the kids out.

Q. The time they marched the kids out?

A. At the time, they marched them out, I left.

Q. Did you leave by the side door or the front door?

A. The front door.

[fol. 37] Q. I want to ask you, Mr. Carter, isn't it a fact that you went into that store with the purpose of being able to come and testify in case any arrests were made?

A. No, that wasn't my purpose.

Q. What was your purpose in going in there?

A. That's a chain store and I had money in my pocket to buy something I saw.

Q. Did you buy anything?

A. No, I didn't.

Q. Did you attempt to buy anything?

A. Yes, I did.

Q. What?

A. I needed a new tip for this walking stick.

Q. Did you get it?

A. No, I didn't.

Q. Did they have it?

A. I think so, but after I saw the kids sit down that took my mind off this walking-stick. That was more interesting than my walking stick, at the present.

Q. So you didn't go to attend to your own business, but you attempted to mind somebody else's?

A. I didn't help 'em.

Q. What?

A. I didn't help 'em mind their business. I merely spoke to 'em and talked to 'em.

Q. You talked with them?

A. Yes. Anything wrong with me talking with them?

Q. I'm not being questioned. Is James Carter, one of the defendants, your brother?

A. Yes, sir.

Q. Where did you first meet up with this group, on this particular morning?

A. Where did I first meet up with them?

[fol. 38] Q. Yes.

A. Well, I didn't meet up with them, when I saw them they were going in Kress'.

Q. And you intended to go in Kress', also?

A. Sure.

Q. You followed them in?

A. Sure I did, I had a purpose for going in there, too.

Q. But you never did sit down?

A. No.

Q. Now, you say that Mr. Hillyar here, with SLED gave an order to close the lunch counter?

A. I didn't say he give the order, I said he give the order under arrest.

Q. Under arrest?

A. Yes.

Q. I understood if my recollection is correct, that you stated that he made the statement that the lunch counter is being closed?

A. I also said that I heard someone else say lunch counter closed and he said you're under arrest.

Q. Now, I believe, on Direct Examination you stated that you could not be positive whether or not, Mr. West, the store manager, made the statement, that the lunch counter —asked them to leave, request it?

A. No, I couldn't say that Mr. West said that, I didn't hear him.

Q. In other words, I understand your testimony, you don't say that he did or he didn't?

A. No.

Q. I believe you testified that James Carter, one of the defendants, is your brother?

A. Yes, sir.

[fol. 39] Q. Do you own an automobile?

A. Me?

Q. Yes?

A. No, sir.

Q. Does James own an automobile?

A. No, sir.

Q. Did you come down to headquarters to get a set of car keys from James?

A. I did.

Q. Whose car was that?

A. My mother's car.

Q. Where is it that you live?

A. Out at Washington Heights, 111 Lake St.

Q. Approximately how far is that from Kress' Store?

A. Well, I'd say, good two and a half miles.

Q. Does your brother James live with you?

A. Yes, we all live together.

Q. Did you all come to town that particular morning together in your mother's car?

A. Yes, we did.

Q. Who else was in the car with you?

A. At the time, Mrs. Jones, she's not here.

Q. Were any of these other nine defendants in the car with you that morning?

A. Yes, sir, I said Mrs. Jones.

Q. Mrs. Jones?

A. Yes.

Q. Is she a defendant here?

A. No, sir, she's not in here. She's at the Juvenile Home, or some place.

Q. She's one that's under sixteen years of age?

A. Yes.

[fol. 40] Q. And that puts three in the car, were there any more in the car?

A. That's all.

Q. At any time that morning, before the arrest, did any of these other nine defendants ride with you or your brother, James, in the car?

A. No.

Q. Where did you leave your car parked?

A. Up on Laurens Street that runs behind Woolworth and Green's, I think that's the name of the street.

Mr. Arnold: Thank you.

(Witness excused.)

Mr. Smith: Next witness, Doris Wright, one of the defendants.

DORIS WRIGHT, being duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Where do you live, Miss Wright?
A. 13 Nichols Street. That's in Nicholtown.
Q. In Greenville?
A. Yes.
Q. At the present are you employed, are you a student, or what is your present—
A. I am a graduate student, I'm not employed.
Q. You're not employed at present?
A. No.
Q. I believe on the morning of August 9, at around eleven o'clock, you went into Kress' Five and Ten Cent Store?
A. That's correct.
[*fol.* 41] Q. Miss Wright, would you tell us what your purpose was in going up to Kress that morning, please?
A. I went in Kress, my main purpose was to be served.
Q. Served where?
A. At the lunch counter.
Q. At the lunch counter? You then went into Kress' with the intention of getting some lunch, or coffee or something like that?
A. Yes.
Q. Did you make a request to be served?
A. I did.
Q. After sitting at the lunch counter?
A. I did.
Q. What was the reply to your request?
A. "I'm sorry, we don't serve Negroes."
Q. Sorry, we don't serve Negroes?
A. Yes.
Q. Were there other people sitting at the counter at that time, Miss Wright?
A. They were.

Q. Were they being served?

A. They were.

Q. Did they continue to serve them?

A. Well, they continued to serve the orders that had been placed, but they didn't, no new orders were made.

Q. No new orders were made?

A. No, no more.

Q. The request or order that the store is closed, was it made at the time that you were there?

A. Yes, it was.

Q. How long had you been seated at the lunch counter before the order, that the lunch counter is closed, was made? [fol. 42] A. We had been sitting at the counter approximately three minutes.

Q. Do you remember what person told you or relayed the order to you that the lunch counter was closed?

A. Well, no, I heard a voice say that "the lunch counter was closed, you're under arrest," and I forgot his name over there, he made the order that the counter was closed and that we were under arrest. Mr. West, did not make the request because he was coming from the back at the time, at the time the arrests were being made.

Q. You pointed over there, who were you pointing at?

A. In the brown suit there, whatever color it is, I can't see from here.

Mr. Smith: Your Honor, I believe that's Mr. Hillyar, would you let the record also show that this witness pointed out Mr. Hillyar of the South Carolina Law Enforcement Division as the person who gave that order?

By Mr. Smith:

Q. Now, the way you just testified, as if the order and the arrest were all in one sentence?

A. It was, in one breath.

Q. No pause?

A. No pause.

Q. As I understand the order was, the lunch counter is closed, you're under arrest?

A. That's right.

Q. And were you immediat ly placed under arrest?

A. We were.

Q. Were you given any opportunity to leave if you'd wanted to, Miss Wright?

A. No.

[fol. 43] Q. Did you observe the lunch counter at all after your arrest, as to whether or not, everybody left the lunch counter?

A. Well, I couldn't say because Officer Wall and the policemen in the back there, they got four girls and put us in a car and immediately carried us down to headquarters. We left the boys and two other girls in the store, they were searching the boys, they were searching the boys in the car.

Q. So you were not able to observe as to whether or not the other people at the counter left or not?

A. No.

Q. Miss Wright, I want to ask you this question, did you expect to be served at Kress on that morning?

A. Well, I had talked with the manager earlier, during some other demonstrations and he had stated that the pressure that was being put on him by our demonstrations. And I also asked him a question, if he would press charges against us, if we would continue coming and he said, no, and also, I went back to the counter since so much pressure is on him, maybe he will break as he is done, as they were serving us in other parts of the store. Maybe he will be willing to serve us at the lunch counter, too.

Q. Then did you expect to be served?

A. Yes, I did.

Q. Did you feel that you had a right to be served?

A. Yes, I did.

Q. That was your purpose for being there that day?

A. That's right.

Mr. Smith: Your witness.

[fol. 44] Cross examination.

By Mr. Arnold:

Q. You referred to other demonstrations, how many times previous to this, had you been to the store and sat down at the lunch counter?

A. I don't recall, it has been several times.

Q. Some three or four?

A. I wouldn't some three or four, I would say it has been several times.

Q. Several times?

A. Yes.

Q. Now several, you mean two?

A. One or more, yes.

Q. One couldn't be several, could it?

A. No, so it would be one or more, could be two, I couldn't vouch for three.

Q. How many in this group of ten defendants were with you on prior occasions going to Kress' Stores, if you can recall, approximately?

A. I would say two to three.

Q. Two to three?

A. Yes.

Q. Where did you ten meet that morning?

A. We didn't.

Q. You mean all ten of you just happened to gather up at Kress'?

A. I didn't say we happened there, I said we didn't meet.

Q. If you didn't happen there, then what did you do, just explain to the Court?

A. Well, I mean, since the curfew and everything, we thought the managers thought we were afraid of our fight for freedom, and our privileges, so we telephoned, when I [fol. 45] say we, I telephoned and other defendants telephoned and we decided we would go get us some coffee. I don't know whether Jim was coming up town, I guess he wanted some coffee, too. I mean, 'cause my pocketbook, I couldn't buy anything else but coffee or soda.

Q. Where is it you live?

A. Nicholtown, 13 Nichol Street.

Q. How did you get to town that morning, in a car or on a bus?

A. I rode the City bus.

Q. Rode the City bus? Did any of these other ten defendants accompany you on the bus that morning?

A. No, they didn't.

Q. But you all did meet there in front of Kress'?

A. No, we didn't.

Q. Where?

A. We didn't meet.

Q. Well, let me ask you this, didn't the ten of you go in the store, more or less, as a group?

A. No, we didn't.

Q. You went in singular?

A. No, we didn't. I don't know how they come, I went in Kress.

Q. Was—

A. I was accompanied by one.

Q. Let me ask you, were any of these other nine defendants already sitting down at the counter when you got into the store?

A. No, they weren't.

Q. You were the first one?

A. Yes, I was.

Q. Now, who was with you?

A. Helen Rose, Helen Evans.

[fol. 46] Q. She's a defendant here?

A. Yes.

Q. Was anyone else with you?

A. No.

Q. How long would you say it was after you all sat down before the eight other defendants came and sat down?

A. It may have been a minute or so.

Q. A minute or so? Well, then, they must have been in the vicinity of Kress' Store?

A. I couldn't say.

Q. All right, you say you all went in there to get some coffee, or to served at the lunch counter?

A. Uh huh.

Q. Can you explain to the Court how these four that had no money could be expected to be served, had no money on their person?

A. Beg your pardon, sir.

Q. These four that Officer Bramlette testified had no money on their person when they were arrested, could you give the Court an explanation as to how they could expect to be served any food or coffee?

A. I imagine they could expect to be served by the waitress, by the waitresses.

Q. But you know it's a matter of common knowledge you don't go into a store and order coffee or food when you don't have any money on your person?

A. I didn't say that they ordered, I said that I ordered.

Q. My question to you, can you offer any explanation to the Court, as how these four that had no money on their persons could have expected to be served food or coffee?

A. No, I don't.

[fol. 47] Q. And you deny that Mr. West made any request to you, to leave?

A. I do.

Q. Did you hear Mr. West say anything?

A. No.

Q. Of course, you are not in position to say whether or not Mr. West may have made a request to some of the other nine?

A. Yes, I am, Mr. West, come from the back of the store, at the time we were being arrested and were told that the lunch counter was closed.

Mr. Arnold: Thank you.

Mr. Smith: Just one minute, one or two questions on Redirect, Your Honor.

Redirect examination.

By Mr. Smith:

Q. First, Miss Wright, I would like to ask you, if you and all your co-defendants, all of you that were arrested that morning, are all of you Negroes?

A. We are.

Q. No white people among them, in that arrest?

A. No.

Q. You have testified here this morning as to the amount of money that each of you, you and your co-defendants, had upon their person and their pockets. Wouldn't it be customary for some of the—

Mr. Partee: That's leading.

Judge Jester: I don't believe I can go along if I'm interpreting your question, Mr. Smith.

Mr. Smith: I believe, I may have started it as being leading, Your Honor, but what I'm after, I believe is admissible. [fol. 48] Judge Jester: Now, if it isn't, I'm going to strike it out. Go ahead, if it isn't, I'm going to strike it out.

Mr. Arnold: Tell the witness not to answer until the Court has ruled.

Judge Jester: Go ahead and ask her but tell her not to answer, I'll ask Doris not to answer until I have ruled.

By Mr. Smith:

Q. I will ask you whether or not it is customary in a group of friends like that for one to pay for whatever another may order, or what two or three may order?

Judge Jester: I'll have to rule that out on account of her previous statement there.

Mr. Smith: All right, that's all.

Mr. Perry: One other witness, please, sir. Your Honor, we would like to call Officer Hillyer of the South Carolina Law Enforcement Division and we presume that by reason of the fact that he is an officer of the South Carolina Law Enforcement Division, that he is hostile and we ask permission to treat him as a hostile witness.

Mr. Partee: Your Honor, I would think that would necessarily be true. He's merely enforcing the law which is any law enforcement officers are—

Judge Jester: I couldn't consider him as a hostile witness, Mr. Perry.

Mr. Perry: I know him quite well, I think he's a very fine gentleman but in this matter—

Judge Jester: He is a law enforcement officer, but I'm a Judge and I'm not a hostile Judge.

Mr. Perry: Not at all.

Judge Jester: I think every darky that's ever been in and sat before me said I done them as fair as anybody else [fol. 49] but I can't say that because I'm working for the City that I'm hostile, so I couldn't go along with you. I'll allow you to call him but I will not put into the record that he is a hostile witness.

Mr. Perry: Well, if at any point in his testimony it develops that he is hostile perhaps Your Honor will reconsider. We ask that Officer Hillyer come to the stand.

Mr. O. R. Hillyer, being duly sworn, testified as follows:

Direct examination.

By Mr. Perry:

Q. Mr. Hillyer, I believe you are an officer of the South Carolina Law Enforcement Division?

A. That's right.

Q. How long have you been working for the agency, sir?

A. Four years and two months.

Q. Do you hold any official position in the office, or are you what is known as patrolman?

A. I'm an agent.

Q. You are an agent?

A. We don't have patrolmen.

Q. I see. What are the general duties of an agent, may I ask?

A. An agent of the South Carolina Law Enforcement Division is set up as an assistant agency to help any police or sheriff's office that needs any assistance that we can render, and we render any assistance we can render.

Q. I see, and who do you receive your orders from?

A. Chief J. P. Strom.

[fol. 50] Q. I see, and Chief J. P. Strom is the head of the South Carolina Law Enforcement Division?

A. That is correct.

Q. May I ask you, sir, who does Chief Strom take his orders from?

A. Governor Hollings.

Q. I see, so when Chief Strom's men go into action, why generally speaking the Governor of the State is more or less, his attitude is reflected by what he would do. On the occasion in question, namely August 9, at which time it has been testified that these defendants were arrested, were you present at Kress' Five and Ten Cent Store?

A. I was present at Kress'.

Q. I see. Were other agents of the South Carolina Law Enforcement Division present?

A. Yes, they were.

Q. Did you render any assistance to the Chief of Police or the other local law enforcement officers on this occasion?

A. I checked a few of the boys, a few of the defendants, I shook them down.

Q. Did you confer with Captain Bramlette concerning the charge which would be placed against them?

A. No, sir, I did not.

Q. Did you any way assist in effecting the arrest?

A. You'll have to ask that another way. I was there to assist Captain Bramlette or any other policeman.

Q. I see, and my question was, did you assist?

A. Yes.

Q. I see. Thank you, sir.

Mr. Perry: You may examine.

[fol. 51] Cross examination.

By Mr. Partee:

Q. Mr. Hillyer, i believe, you were in the store before Captain Bramlette and Officer Vaughn, perhaps some other officers arrived?

A. I was.

Q. Who gave the order or made the request for the defendants to leave the store?

A. Mr. West. Mr. West, told th m the store was closed, the lungh counter was closed.

Q. Was he in a position and was his voice loud enough for these ten defendants to have heard him?

A. Yes, sir.

Q. After he made that request, what happened?

A. After Mr. West said the lunch counter was closed, the defendants just remained seated, and a few minutes after he had made the request Captain Bramlette said "you are under arrest."

Q. Captain Bramlette is the one who put them under arrest?

A. That's correct, sir.

Q. Did you put any of them under arrest?

A. No, sir, Captain Bramlette ordered placed them under arrest.

Q. Did you at any time say "the lunch counter is closed, you're under arrest"?

A. I did not.

Q. Now, there's been testimony that the request order to leave and the arrest was simultaneous, is that true or not?

A. That is not true.

[fol. 52] Q. Now, after Mr. West said the lunch counter is closed, did he also say "you are requested to leave or everybody leave the counter" or anything like that?

A. He said "the lunch counter is closed, everybody leave" but the defendants didn't move.

Q. There's no doubt in your mind they all heard it?

A. No doubt in my mind they all heard it.

Mr. Partee: Thank you, sir.

Mr. Perry: Just one more question. Now, as I understand it, in response to these questions you stated that Captain Bramlette made the arrest, that as I understood your earlier testimony, you did render assistance to Captain Bramlette?

The Witness: That's correct.

Mr. Perry: Very good, sir. I think that's all.

(Witness excused.)

Mr. Perry: Your Honor, that's the defendant's case.

Mr. Arnold: We have nothing in reply.

Renewal of Motions and Denial Thereof

Mr. Perry: At this time, may it please the Court, the defendants would like to renew all motions for dismissal which were made at the conclusion of the City's case and we would like to renew them in this manner as if repeated again in their entirety. My purpose being to expedite these proceedings.

Mr. Arnold: We are willing to agree to that, we ask that they be reproduced in the record as if so done.

Judge Jester: Motion so denied.

Mr. Perry: I would like, at this time, to make this additional motion which is to be appended to the motions which were made at the conclusion of the City's case. At this time, the defendants move for a dismissal of these cases which charged these defendants, all of whom are Negroes, with the violation of the statute which is set forth in the warrant, on the ground that the Negroes, the Negro de- [fol. 53] fendants, were arrested and charged under a statute which is itself unconstitutional on its face, by making it a crime to be on public property after being asked to leave by an individual, at such individual's whim. In that, such statute does not require that the person making the demand to leave, present documents or other evidence of possessing a right sufficient to apprise the defendants of the validity of the demand to leave. All of which renders the statute so vague and uncertain, as applied to the defendants, as to violate their rights under the due process clause of the 14th Amendment to the United States Constitution, that is the motion, no argument on that, sir.

Judge Jester: Motion denied, Mr. Perry.

Mr. Perry: All right, sir. May it please the Court for whatever it's worth, we should like to have placed in evidence the ordinances of the City of Greenville, Section 31-B as amended. We should like very much to have, Your Honor, consider that as a part of the evidence in this case, and we make this observation that although the warrant does not cite that particular ordinance, Captain Bramlette stated in his testimony that he had this and all the ordinances of the City of Greenville and the statutes of the State of South Carolina affecting this situation in his mind. We would, therefore, like to have this ordinance included in the evidence.

Mr. Arnold: Your Honor, to identify, Mr. Perry, Section 31-B of the 1953 Greenville City Code as amended.

Mr. Perry: Thank you.

Mr. Arnold: We can't see the relevancy of it, it's just encumbering the record, there's no charge on it.

[fol. 54] Judge Jester: I'd have to deny it because I'm trying this case purely on those facts and the substance thereof, of the ac as set forth in the warrant on the arrest.

Mr. Perry: All right, sir. The defendants will agree to waive any final argument before judgment, if that is acceptable to the City.

Mr. Arnold: We agree to that, Your Honor.

Judge Jester: Let the record so show that both the Defendants and the City waive the arguments and places the case in the hands of the Recorder, is my understanding.

Mr. Perry: Beg your pardon?

Judge Jester: That's my understanding, no argument.

Mr. Perry: I might say depending on whatever ruling we may have one or two observations that we would like to make.

SENTENCE

Judge Jester: Sentence of the Court that James Richard Peterson, James Carter, David Ralph Strawder, Frank G. Smith, Robert Crockett, Joan Yvonne Eddy, Helen Angela Evans, Harold James Fowler, Doris Wright, Rose Marie Collins, pay a fine of $100.00, or serve a sentence of thirty days.

Mr. Perry: May it please the Court, at this time, the defendants each move for arrest of judgment or in the alternative for a new trial.

(Off the record.)

Mr. Perry: The defendants based upon all motions and all grounds used in said motions both at the beginning of this proceeding, at the end of the presentation of the City's case, and at the end of the defendant's case, we move for arrest of judgment or in the alternative a new trial based upon all those grounds and we ask that they be stated in [fol. 55] the record, in the new form, that is motion for arrest of judgment or alternative for new trial.

Mr. Arnold: We have no objection to that form. In other words, there's no need to encumber the record by repeating it.

Mr. Perry: Very good, sir.

Judge Jester: All right.

Mr. Perry: At this time, may it please the Court, the defendants each give verbal notice of appeal and we state to the Court that within the period required by statute we would tender the formal written notice incorporating our exceptions and we ask that the Court set an appeal binder in this matter.

Judge Jester: Two hundred-dollar bond in each case, Mr. Perry, same they have up now, an appeal bond, and if necessary, do you need a little time? I think Mr. Arnold will be glad to give you additional time in which to get up the appeal and file all the papers. I think the appeal is ordinarily gotten up in twenty-four hours and if he needs a little extra time, there's no objection to that.

Mr. Arnold: Counsel of the parties have just agreed, subject to Your Honor's approval, that the appearance bonds signed on August 9, 1960, by Mr. M. B. Tolbert for each of the ten defendants in the amount of $200.00 be considered and continued as an appeal bond without the necessity of formally re-executing the bonds, is that agreeable with opposing Counsel?

Mr. Smith: That's agreeable.

Mr. Perry: That's agreeable.

Mr. Arnold: I think that the Bondsman might have to be sworn.

[fol. 56] M. B. Tolbert, being duly sworn, testified as follows:

Direct examination.

By Mr. Arnold:

Q. Do you agree to continue the ten appearance bonds each in the amount of $200.00 that you have signed for each of these ten defendants on August 9, 1960, to be continued and considered as an appeal bond and that your liability will remain $200.00 each on said bond.

A. Yes, I do.

Mr. Arnold: You think that's sufficient?

Mr. Smith: That's fine.

Mr. Perry: Thank you very much.

(Witness excused.)

Judge Jester: Thank you, gentlemen. Court adjourned.

(Court adjourned at 10:50 a. m.)

SEC. 31-8, CODE OF GREENVILLE, 1953, AS AMENDED

Sec. 31-8, Code of Greenville, 1953, as amended by 1958 Cumulative Supplement.

It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:

(a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;

[fol. 57] (b) Separate tables, counters or booths;

(c) A distance of at least thirty five feet shall be maintained between the area where white and colored persons are served;

(d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;

(e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races. (Code 1953, Sec. 31-8, Ord. No. 9, Sec. 1.)

IN THE GREENVILLE COUNTY COURT

ORDER—March 17, 1961

This is an appeal to this Court from the Recorder's Court of the City of Greenville.

The Defendants were tried on August 11, 1960, in the Greenville City Recorder's Court before the Recorder, John V. Jester, upon a charge of violating the Act of May 20, 1960, which in substance makes any person a trespasser who refuses to leave the premises of another immediately upon being requested to leave.

The Act is very simple and plain in its language.

It appears that on August 9, 1960, the ten Defendants, who are making this appeal, with four other young Negro youths went to the store of S. H. Kress and Company and seated themselves at the lunch counter at that store. At the trial there seemed to be some attempt to minimize the evidence of the officers involved as to whether or not the Defendants, now Appellants, refused to leave the premises immediately upon the request of the store manager that they should leave. However, in the argument of the chief counsel for the Appellants, all question of doubt in this respect is resolved in favor of the City. According to the written Brief of the Defendants, the Defendants now [fol. 58] "seated themselves at the lunch counter where they sought to be served. They were not served and, in fact, were told by the management that they could not be served and would have to leave. The Defendants refused to leave and remained seated at the lunch counter."

The act clearly makes it a criminal offense for any person situated as the Defendants were to refuse or fail to "*immediately*" depart upon request or demand.

Therefore, the main question before this Court is whether or not the Appellants were lawfully tried on a charge of violating this Act by refusing to leave the lunch counter immediately when requested to do so.

In the oral argument counsel for the Appellants seemed to reply in a vague manner upon an "unconstitutional application" of the Statute.

As the Court views the statute it was merely a statutory enlargement and re-enactment of the common law in South

Carolina which has been recognized for more than a half century to the effect that when a property owner, whether it be a dwelling house or place of business, has the right to order any person from the premises whether they be an invitee or an uninvited person. This principle of law was fully and clearly reaffirmed by the Supreme Court of South Carolina in the recent case of *State v. Starner et al.*, 49 S. E. (2d) 209.

For scores of years South Carolina has had a number of Statutes with reference to the law of trespass. They are now embodied as Article 5, Code of 1952, embracing Sections 16-381 to 16-394. Section 17-386 particularly refers to trespasses after notice.

Therefore, the Act of May 20, 1950, now designated in the 1952 Code as Sec. 17-388 is the controlling factor here. There can be no doubt that the field into which the Legisla-
[fol. 59] ture entered by the enactment of this particular law was a well recognized portion of the law of the State of South Carolina. The Constitutionality of the Act cannot be questioned.

Every presumption will be made in favor of the Constitutionality of a statute. There are more than fifty decisions by the Supreme Court of South Carolina to this effect. The United States Supreme Court in many cases has recognized that there is a presumption in favor of the constitutionality of an Act of Congress or of a State or Municipal legislative body. In the case of *Davis v. Department of Labor*, 317 U. S. 255, 87 Law Ed. 250, the United States Supreme Court held that there is a presumption of constitutionality in favor of State statutes. Time and time again the Supreme Court of South Carolina has held "the law is well settled that the burden is on the person claiming the Act to be unconstitutional to prove and show that it is unconstitutional beyond a reasonable doubt". *McCollum v. Snipes*, 49 S. E. 12, 213 S. C. 254.

In 16 C. J. S. 388, we find this language "Statutes are presumed to be valid and a party attacking a statute as unconstitutional has the burden of proof". Over five hundred decisons from all over the United States are cited to support this statement of the law.

The argument of counsel for the Appellants failed to raise a single serious question as to the constitutionality of the statute.

Counsel for Appellants insisted upon the right of the Defendants to adduce evidence of some alleged conspiracy or plan on the part of the officers of the law and store management to bring about this prosecution. We think the sole issue in the Recorder's Court was whether or not the Defendants were guilty of violating the Act in question. They now boldly admit through counsel that they defied [fol. 60] the management of the store and refused to leave when requested. Had they departed from the store immediately, as the law requires they should have, there would have been no arrest, but apparently in accordance with a preconceived plan they all kept their seats and defied the management and refused to leave the premises.

Evidence of any other motive on the part of the management would have thrown no light on this case.

In my opinion the appeal should be dismissed because the prosecution was conducted under a valid constitutional statute and in addition the appeal should be dismissed upon the ground that S. H. Kress and Company had a right to control its own business. We think this position is fully sustained under the recent case of *William* v. *Johnson*, Res. 344, 268 Fed. (2d) 845, and the North Carolina case of *State* v. *Nelson*, decided January 20, 1961, and reported in 118 S. E. (2d) at page 47.

I carefully considered all the exceptions made by the Appellants and I am unable to sustain any of them. It is, therefore,

Ordered, adjudged and decreed that the Appeal be dismissed.

James H. Price, Special Judge, Greenville County Court.

March 17, 1961.

[fol. 61]

IN THE GREENVILLE COUNTY COURT

NOTICE OF INTENTION TO APPEAL—March 21, 1961

To Messrs. W. H. Arnold and H. F. Partee, Attorneys for the City of Greenville:

You will please take notice that the defendants above named intend to and do hereby appeal to the Supreme Court of South Carolina from the Order of the Greenville County Court in the above matter, dated March 17, 1961, the case and exceptions to be hereafter served upon you.

Willie T. Smith, Jr., Lincoln C. Jenkins, Jr.,
Matthew J. Perry, Attorneys for Defendants.

March 21, 1961.

Due and legal service of the foregoing Notice is accepted this 22 day of March, 1961.

H. F. Partee, City Attorney.

IN THE GREENVILLE COUNTY COURT

EXCEPTIONS

1. The Court erred in refusing to hold that the warrant is vague, indefinite and uncertain and does not plainly and substantially set forth the offense charged, thus failing to provide appellants with sufficient information to meet the charges against them as is required by the laws of the State of South Carolina, in violation of appellants' rights to due process of law, secured by the Fourteenth Amendment to the United States Constitution.

2. The Court erred in refusing to hold that the State failed to establish the *corpus delicti*.

3. The Court erred in refusing to hold that the State failed to prove a *prima facie* case.

[fol. 62] 4. The Court erred in refusing to hold that the evidence of the State shows conclusively that by arresting

appellants the officers were aiding and assisting the owners and managers of S. H. Kress and Company in maintaining their policies of segregating or excluding service to Negroes at their lunch counters on the ground of race or color, in violation of appellants' rights to due process of law and equal protection of the laws, secured by the Fourteenth Amendment to the United States Constitution.

5. The Court erred in refusing to hold that the evidence establishes merely that the appellants were peacefully upon the premises of S. H. Kress and Company, an establishment performing an economic function invested with the public interest as customers, visitors, business guests or invitees, and that there is no basis for the charge recited by the warrants other than an effort to exclude appellants from the lunch counter of said business establishment because of their race and color, thereby depriving appellants of liberty without due process of law and equal protection of the laws, secured by the Fourteenth Amendment to the United States Constitution.

6. The Court erred in refusing to hold that the statute appellants are alleged to have violated, to wit: Act No. 743 of the Acts and Joint Resolutions of the General Assembly of South Carolina for 1960 (R 896, H 2135), is unconstitutional on its face by making it a crime to be on public property after being asked to leave by an individual at such individual's whim and does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise appellants of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to [fol. 63] appellants as to violate their rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

7. The Court erred in refusing to permit defendants' counsel to elicit relevant testimony concerning cooperation of Store Managers and Police in the City of Greenville, South Carolina in pursuing the store managers' policies, customs and practices of segregating or excluding Negroes from their lunch counters.

IN THE GREENVILLE COUNTY COURT

AGREEMENT AS TO RECORD

It is hereby stipulated and agreed by and between counsel for the appellants and respondent that the foregoing when printed, shall constitute the Transcript of Record herein and that printed copies thereof may be filed with the Clerk of the Supreme Court and shall constitute the Return herein.

W. H. Arnold, Greenville, S. C., H. F. Partee, Greenville, S. C., Attorneys for Respondent.

Jenkins & Perry, Columbia, S. C., By Matthew J. Perry, Willie T. Smith, Jr., Greenville, S. C., Attorneys for Appellants.

[fol. 64]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

CITY OF GREENVILLE, Respondent,

v.

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT and ROSE MARIE COLLINS, Appellants.

Appeal From Greenville County
James H. Price, Special County Judge

Case No. 4761

OPINION No. 17845—Filed November 10, 1961

Affirmed

Jenkins & Perry, of Columbia, and Willie T. Smith, Jr., of Greenville, for appellants.

W. H. Arnold and H. F. Partee, both of Greenville, for respondent.

TAYLOR, C. J.: Defendants were convicted of the charge of trespass after notice in violation of Section 16-388, Code of Laws of South Carolina, 1952, as amended, and appeal. By agreement of counsel, all bail bonds were continued in effect pending disposition of this appeal.

On August 9, 1960, in response to a call, law enforcement officers were dispatched to the S. H. Kress Store in Greenville, South Carolina, a member of a large chain of stores operated throughout the United States and described as a junior department store. Upon arrival they found the ten defendants and four others who were under sixteen years of age, all Negroes, seated at the lunch counter. There is testimony to the effect that because of the local custom to serve white persons only at the lunch counter the manager of the store announced that the lunch counter was closed, the lights were extinguished, and all persons were requested to leave. The white persons present left, but all Negroes refused to leave; and those above the age of sixteen were thereupon charged with trespass after notice as provided in the aforementioned section of the Code, which provides:

"Any person:

"(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or

"(2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,

"Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days."

Defendants contend, first, error in refusing to dismiss the warrant upon the ground that the charge contained therein

was too indefinite and uncertain as to apprise the defendants as to what they were actually being charged with. [fol. 65] Defendants were arrested in the act of committing the offense charged, they refused the manager's request to leave after the lunch counter had been closed and the lights extinguished; and there could have been no question in defendants' minds as to what they were charged with. Further, there was at that time no claim of lack of sufficient information, and upon trial there was no motion to require the prosecution to make the charge more definite and certain. Defendants rely upon State v. Randolph, et al., —— S. C. ——, 121 S. E. (2d) 349, where this Court held that it was error to refuse defendants' motion to make the charge more definite and certain in a warrant charging breach of the peace. It was pointed out in that case that breach of the peace embraces a variety of conduct and defendants were entitled to be given such information as would enable them to understand the nature of the offense. This is not true in instant case where the charges were definite, clear and unambiguous; further, no motion was made to require the prosecution to make the charge more definite and certain. There is no merit in this contention.

Defendants next contend that their arrest and conviction was in furtherance of a custom of racial segregation in violation of the Fourteenth Amendment to the Constitution of the United States.

Defendants entered the place of business of the S. H. Kress Store and seated themselves at the lunch counter, they contend, for the purpose of being served, although four of them had no money and there is no testimony that such service was to be paid for by others.

The testimony reveals that the lunch counter was closed because it was the custom of the S. H. Kress Store in Greenville, South Carolina, to serve whites only and after all persons had left or been removed the lunch counter was reopened for business. The statute with no reference to segregation of the races applies to "Any person: * * * Who fails and refuses without cause or good excuse * * * to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative, * * * " The act makes no reference to race or

color and is clearly for the purpose of protecting the rights of the owners or those in control of private property. Irrespective of the reason for closing the counter, the evidence is conclusive that defendants were arrested because they chose to remain upon the premises after being requested to leave by the manager.

Defendants do not attack the statute as being unconstitutional but contend that their constitutional rights were abridged in its application in that they were invitees and had been refused service because of their race. The cases cited do not support this contention while there are a number of cases holding to the contrary. See Hall v. Commonwealth, 188 Va. 72, 49 S. E. (2d) 369, 335 U. S. 875, 69 S. Ct. 240, 93 L. Ed. 418; Henderson v. Trailway Bus Company, D. C. Va., 194 F. Supp. 423; State v. Clyburn, 247 N. C. 455, 101 S. E. (2d) 295; State v. Avent, 253 N. C. 580, 118 S. E. (2d) 47; Williams v. Howard Johnson Restaurant, 4 Cir., 268 F. (2d) 845; Slack v. Atlantic White Tower System, Inc., D. C. Md., 181 F. Supp. 124, 4 Cir., 284 F. (2d) 746; Griffin v. Collins, D. C. Md., 187 F. Supp. 149; Wilmington Parking Authority v. Burton, Del., 157 A. (2d) 894; Randolph v. Commonwealth, —— Va. ——, 119 S. E. (2d) 817. The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful, Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. (2d) 441; and the operator of a privately owned business may accept some customers and reject others on purely personal grounds in the absence of a statute to the contrary, Alpaugh v. Wolverton, 184 Va. 943, 136 S. E. (2d) 906. In the absence of a statute forbidding discrimination based on race or color, the operator of a privately owned place of business has the right to select the clientele he will serve irrespective of color, State v. Avent, 253 N. C. 580, 118 S. E. (2d) 47. Although the general public has an implied license to enter any retail store the proprietor or his agent is at liberty to revoke this license at any time and to eject such individual if he refuses to leave when requested to do so, Annotation 9 A. L. R. 379; Annotation 33 A. L. R. 421; Brookside-Pratt Mining Co. v. Booth, 211 Ala. 268, 100 So. 240, 33 A. L. R. 417; and may lawfully forbid any and all persons, regardless of

reason, race or religion, to enter or remain upon any part of his premises which are not devoted to public use, Henderson v. Trailway Bus Company, 194 F. Supp. 426.

[fol. 66] The lunch counter was closed, the lights extinguished, and all persons requested to quit the premises. Defendants refused and their constitutional rights were not violated when they were arrested for trespass.

Upon cross-examination of Capt. G. O. Bramlette of the Greenville City Police Department, it was brought out that the City of Greenville has an ordinance making it unlawful for any person owning, managing, or controlling any hotel, restaurant, cafe, etc., to furnish meals to white persons and colored persons except under certain conditions; and Defendants contend that they were prosecuted under this ordinance; however, the warrant does not so charge and there is nothing in the record to substantiate this contention. The ordinance was made a part of the record upon request of defendants' counsel but defendants were not charged with having violated any of its provisions. The question of the validity of this ordinance was not before the trial Court and therefore not before this Court on appeal.

Defendants further contention that the prosecution failed to establish the corpus delicti is disposed of by what has already been said.

We are of opinion that the judgment and sentences appealed from should be affirmed; and It Is So Ordered. Affirmed.

Oxner, Legge, Moss and Lewis, JJ., concur.

[fol. 68]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

[Title omitted]

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of South Carolina:

Petitioners, James Richard Peterson, Yvonne Joan Eddy, Helen Angela Evans, David Ralph Strawder, Harold James

Fowler, Frank G. Smith, Robert Crockett, James Carter, Doris Delores Wright and Rose Marie Collins, respectfully request a rehearing in the above entitled case. We respectfully submit that this Court, in affirming the judgment of the Court below, may have overlooked or misapprehended certain facts and rules of law, urged by petitioners in their appeal.

1. The Court may have overlooked the fact that the Manager of Kress' did not close his store premises on the day petitioners were arrested, and testified that he closed the lunch counter only because of petitioners' presence, moreover, he reopened the counter as soon as petitioners [fol. 69] were removed from the premises. It thus does not appear that there was an actual closing of the premises and the Manager was apparently only cooperating with the police.

2. The Court may have overlooked the testimony of Captain Bramlette (Tr. pp. 9-10, ff. 33-37) and of Mr. West, the store manager (Tr. p. 25, ff. 97-98) that their acts on the day petitioners were arrested were motivated in part by Section 31-8, Code of the City of Greenville, which requires segregation of the races in eating establishments. Given the consideration urged by petitioners, it becomes apparent that though they were prosecuted in the name of trespass, their arrests and convictions were based upon their attempted use of eating facilities reserved by custom for white persons. Further, petitioners were welcomed as business invitees in all other departments of the store and could have purchased any part or all of more than ten thousand items which the store offered for sale.

3. The Court may have misapprehended that Section 16-388, Code of Laws of South Carolina for 1952, was invoked against petitioners in this case solely for the purpose of preserving and furthering the custom of excluding Negroes from Lunch Counters in Greenville, South Carolina or segregating them in same, in violation of petitioners' rights to due process of law and equal protection of the laws, protected by the Fourteenth Amendment to the United States Constitution.

4. The Court may have overlooked petitioners' assertion that they were unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment. The Court further overlooked the applicability of *Marsh* v. *Alabama*, 326 U. S. 501, 90 L. Ed. 265, 66 S. Ct. 276, and *Munn* v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77, to this argument.

[fol. 70] 5. The Court may have overlooked petitioners' assertion that in arresting and prosecuting petitioners, the State has either enforced or supported racial segregation in a place open to the general public, thereby infringing their rights under the Fourteenth Amendment to the United States Constitution. Petitioners, in their appeal, did not challenge the right of the store manager to select his customers, but asserted that the State cannot implement and enforce segregation by direct action on the part of its police nor by statutory scheme. The record demonstrates that both forms of State action were present in this matter.

Conclusion

Wherefore, petitioners request they be granted a rehearing in this case.

Columbia, South Carolina
November 16, 1961

Jenkins and Perry, Columbia, South Carolina, By: Matthew J. Perry; Willie T. Smith, Jr., Greenville, South Carolina, Attorneys for Petitioners.

[fol. 71]

Certificate to Petition for Rehearing

I, Harold R. Boulware, hereby certify that I am a practicing attorney of this Court and am in no way connected with the within case. I further certify that I am familiar with the record of this case and have read the opinion of this Court which was filed November 10, 1961, and in my opinion there is merit in the Petition for Rehearing.

Harold R. Boulware

Columbia, South Carolina
November 16, 1961.

[fol. 72]

IN THE SUPREME COURT OF SOUTH CAROLINA

ORDER DENYING PETITION FOR REHEARING
—November 30, 1961

The Court neither overlooked nor misapprehended any of the facts set forth herein. Therefore the Petition is denied.

C. A. Taylor, C.J., G. Dewey Oxner, A.J., Lionel K. Legge, A.J., Joseph R. Moss, A.J., J. Woodrow Lewis, A.J.

[fol. 73]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

[Title omitted]

PETITION FOR STAY OF REMITTITUR

To the Honorable Claude A. Taylor, Chief Justice of the Supreme Court of South Carolina:

The petition of James Richard Petersen, Yvonne Joan Eddy, Helen Angela Evans, David Ralph Strawder, Harold James Fowler, Frank G. Smith, Robert Crockett, James Carter, Doris Delores Wright and Rose Marie Collins, respectfully shows:

1.

Petitioners have been convicted of the offense of trespass after notice under Section 16-388, Code of Laws of South Carolina for 1952. Their sentences and convictions have been affirmed by the Supreme Court of South Carolina in an Opinion which was filed on November 10, 1961.

2.

Thereafter, petitioners requested rehearing of said cause in a Petition therefor dated November 16, 1961. Rehearing was denied on November 30, 1961.

3.

Petitioners are aggrieved with said decision and intend to petition the Supreme Court of the United States for a Writ of Certiorari in order that that Court can pass upon petitioners' contention that their arrests and convictions [fol. 74] were in furtherance of a custom of racial segregation in violation of the Fourteenth Amendment to the United States Constitution.

4.

Under the Rules of the United States Supreme Court, petitioners have ninety (90) days after the rendering of the final judgment of this Court within which to file their Petition for Writ of Certiorari. Petitioners are therefore desirous of obtaining a stay of the sentences imposed upon them and a Stay of the Remittitur herein for a period of ninety (90) days after the rendering of the final judgment of this Court in order that they may have time within which to file said Petition for Writ of Certiorari.

5.

Counsel for the City of Greenville have agreed to a proposed Order, Staying the Remittitur for the requested period.

Wherefore, petitioners pray that execution of their sentences be stayed and that Remittitur in this matter be stayed by order to this Honorable Court for a period of ninety (90) days after the final judgment of said Court in order that they may file in the United States Supreme Court a Petition for Writ of Certiorari.

Jenkins and Perry, Columbia, South Carolina, By: Matthew J. Perry; Willie T. Smith, Jr., Greenville, South Carolina, Attorneys for Petitioners.

December 1, 1961

[fol. 75]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

[Title omitted]

ORDER STAYING REMITTITUR—December 2, 1961

On the 10th day of November, 1961, we issued an Opinion in the above case, affirming the judgment of the Greenville County Court which sustained the judgment of the Municipal Court of the City of Greenville wherein appellants were convicted of violating Section 16-388, Code of Laws of South Carolina for 1952, namely, Trespass after Notice.

Thereafter, appellants petitioned this Court for a rehearing and, on November 30, 1961, we entered an Order, denying same.

Appellants have now indicated that they desire and intend to file in the Supreme Court of the United States a Petition for Writ of Certiorari, seeking review of our judgment in said cause. Under the rules and decisions of the United States Supreme Court, they have ninety (90) days after the final judgment of this Court within which to file their Petition for Writ of Certiorari. The final judgment of this Court is the Order, denying rehearing. *Department of Banking, State of Nebraska* v. *Pink*, 63 S. Ct. 233, 317 U. S. 264, 87 L. Ed. 254. They desire a stay of the Remittitur and Sentences in this matter pending the filing of their petition for Writ of Certiorari in the United States Supreme Court and thereafter until said matter has been disposed of by that Court. It appears that the request for stay of remittitur and sentences is proper. Now, on motion of counsel for the appellants, by [fol. 76] and with the consent of counsel for the respondent,

It Is Ordered that the Remittitur and execution of the Sentences herein be stayed for a period of ninety (90) days after the day of the final judgment of this Court in order that they may file with the United States Supreme Court their Petition for Writ of Certiorari.

It Is Further Ordered that if a notice from the Clerk of the United States Supreme Court that the Petition for Writ of Certiorari has been filed in that Court is filed with the Clerk of the Supreme Court of South Carolina

within the time aforesaid, the stay of remittitur and execution of sentences herein shall continue in effect until final disposition of the case by the Supreme Court of the United States.

December 2d, 1961.

C. A. Taylor, Chief Justice.

We Consent: W. H. Arnold, H. F. Partee, Attorneys for Respondent.

[fol. 77] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 78]

SUPREME COURT OF THE UNITED STATES

No. 750, October Term, 1961

JAMES RICHARD PETERSON, et al., Petitioners,

vs.

CITY OF GREENVILLE.

ORDER ALLOWING CERTIORARI—June 25, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted, and the case is transferred to the summary calendar. The case is set for argument to follow No. 721.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this petition.

Office-Supreme Court, U.S.
FILED
FEB 26 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. [redacted] 71

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT and ROSE MARIE COLLINS,

Petitioners,

—v.—

CITY OF GREENVILLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

JACK GREENBERG
CONSTANCE BAKER MOTLEY
JAMES M. NABRIT, III
MICHAEL MELTSNER
10 Columbus Circle
New York 19, New York

MATTHEW J. PERRY
LINCOLN C. JENKINS, JR.
1107½ Washington Street
Columbia 1, South Carolina

WILLIE T. SMITH
Greenville, South Carolina

Attorneys for Petitioners

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IN THE

Supreme Court of the United States

October Term, 1961

No. .....

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT and ROSE MARIE COLLINS,

Petitioners,

—v.—

CITY OF GREENVILLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in the above entitled case on November 10, 1961, rehearing of which was denied November 30, 1961.

Citation to Opinions Below

The opinion of the Supreme Court of South Carolina, which opinion is the final judgment of that Court, is reported at 122 S. E. 2d 826 (1961) and is set forth in the appendix hereto, *infra* pp. 5a-10a. The opinion of the Greenville County Court is unreported and is set forth in the appendix hereto, *infra* pp. 1a-4a.

Jurisdiction

The Judgment of the Supreme Court of South Carolina was entered November 10, 1961, *infra* pp. 5a-10a. Petition for rehearing was denied by the Supreme Court of South Carolina on November 30, 1961, *infra* p. 11a.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code Section 1257(3), petitioners having asserted below, and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

Whether Negro petitioners were denied due process of law and equal protection of the laws as secured by the Fourteenth Amendment:

1. When arrested and convicted of trespass for refusing to leave a department store lunch counter where the store's policy of excluding Negroes was made pursuant to local custom and a segregation Ordinance of the City of Greenville.

2. Whether petitioner sit-in demonstrators were denied freedom of expression secured by the Fourteenth Amendment when convicted of trespass upon refusal to move from a white-only lunch counter when (a) the manager did not request arrest or prosecution and was apparently willing to endure the controversy without recourse to the criminal process and exclusion from the counter was required by a City Ordinance commanding segregation in eating facilities, and (b) the convictions rest on a statute which fails to re-

quire proof that petitioners were requested to leave by a person who had established authority to issue such request at the time given.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Section 16-388, Code of Laws of South Carolina, 1952, as amended 1960:

> Any person:
>
> (1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or
>
> (2) who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,
>
> Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

3. This case involves Section 31-8, Code of Greenville, 1953, as amended by 1958 Cumulative Supplement (R. 56, 57):

> It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating

house, boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:

a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;

b) Separate tables, counters or booths;

c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;

d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;

e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races.

Statement

Petitioners, ten Negro students, were arrested for staging a sit-in demonstration at the lunch counter of the S. H. Kress and Company department store on August 9, 1960 (R. 3), in Greenville, South Carolina, a City which by Ordinance requires segregation in eating facilities (R. 56, 57) and were convicted of trespass in violation of Section 16-388, Code of Laws of South Carolina, 1952, as amended

1960 and sentenced to pay a fine of one hundred dollars ($100.00) or serve thirty (30) days in jail (R. 54).

After informing the S. H. Kress and Company department store in Greenville of their desire to be served at the store's lunch counter and learning that the manager would not press charges against them if they sought service (R. 43), petitioners, at about eleven A.M., seated themselves at the lunch counter and requested service (R. 40, 41). White persons were seated at the counter at the time (R. 19, 20, 41). Petitioners were told, "I'm sorry, we don't serve Negroes" (R. 41).

Also at about eleven A.M., Captain Bramlette of the Greenville Police Department received a call to go to the Kress store (R. 5). He did not know where the call came from (R. 5). He was told that there were colored young boys and girls at the lunch counter (R. 9) and he knew that the City of Greenville had an Ordinance prohibiting colored and white persons being seated at the same lunch counter (R. 9). He arrived at the store with several city policemen and found two agents of the South Carolina Law Enforcement Department already present at the lunch counter (R. 6). He noticed the ten petitioners seated at the lunch counter (R. 6) which could accommodate almost fifty-nine persons (R. 27). The petitioners were orderly and inoffensive in demeanor (R. 12, 25, 26).

In the presence of the police officers the counter lights were turned out (R. 19) and G. W. West, manager of the store requested " . . . everybody to leave, that the lunch counter was closed" (R. 19). At the trial, petitioners' counsel was denied permission to ascertain whether this request followed arrangement or agreement with the Police (R. 23, 24, 26). Neither Mr. West, the manager, nor the police officers, testified that West identified himself or his authority to the petitioners either before or after making

this announcement.[1] When petitioners made no attempt to leave the lunch counter, Captain Bramlette placed them under arrest (R. 20).[2]

Store manager West at no time requested that defendants be arrested (R. 26):

> Q. And you at no time requested Captain Bramlette and the other officers to place these defendants under arrest, did you? A. No, I did not.
>
> Q. That was a matter, I believe, entirely up to the law enforcement officers? A. Yes, sir.

White persons were seated at the counter when the announcement to close was made (R. 20, 33, 34) but no white person was arrested (R. 34). As soon as petitioners were removed by the police, the lunch counter was reopened (R. 24, 34).

West testified that one of the store's employees called the police (R. 23) but when petitioners' counsel attempted to bring out any arrangements or agreements between the store and the police, the Court denied permission to proceed (R. 23-24, 26). But West testified that he closed the lunch counter because of the Greenville City Ordinance requiring racial segregation in eating facilities and local custom:

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[1] There is evidence that one of the petitioners, Doris Wright, had spoken with the store manager prior to the demonstration (R. 43), but the record is without evidence that any of the other petitioners were informed or had reason to know that the person who requested them to leave had authority to do so. Doris Wright, moreover, testified that the request to leave was made by the Police and not by manager West who "... was coming from the back at the time ... the arrests were being made" (R. 42, 47).

[2] Four other Negro demonstrators were arrested but their cases were disposed of by the juvenile authorities (R. 6).

Q. Mr. West, why did you order your lunch counter closed? A. It's contrary to local custom and it's also the Ordinance that has been discussed (R. 25).

On cross examination, Captain Bramlette, the arresting officer, evidenced confusion as to whether defendants were arrested because they violated Greenville's Ordinance requiring segregation in eating facilities or the State of South Carolina's trespass statute (R. 16, 17):

Q. Did the manager of Kress', did he ask you to place these defendants under arrest, Captain Bramlette? A. He did not.

Q. He did not? A. No.

Q. Then why did you place them under arrest? A. Because we have an Ordinance against it.

Q. An Ordinance? A. That's right.

Q. But you just now testified that you did not have the Ordinance in mind when you went over there? A. State law in mind when I went up there.

Q. And that isn't the Ordinance of the City of Greenville, is it? A. This supersedes the order for the City of Greenville.

Q. In other words, you believe you referred to an ordinance, but I believe you had the State statute in mind? A. You asked me have I, did I have knowledge of the City Ordinance in mind when I went up there and I answered I did not have it particularly in my mind, I said I had the State Ordinance in my mind.

Q. I see and so far this City Ordinance which requires segregation of the races in restaurants, you at no time had it in mind, as you went about answering the call to Kress' and placing these people under arrest? A. In my opinion the state law was passed recently supersedes our City Ordinance.

This "State Law" is the trespass statute petitioners were charged with violating. Previously, Captain Bramlette had testified that he thought the State's trespass statute prohibited "sit-ins." He later admitted that the statute did not mention "sit-ins" (R. 14).

Kress and Company is a large nationwide chain (R. 21) which operates junior department stores (R. 21). The Greenville branch has fifteen to twenty departments, sells over 10,000 items and is open to the general public (R. 21, 22). Negroes and whites are invited to purchase and are served alike with the exception that Negroes are not served at the lunch counter which is reserved for whites (R. 22). Kress's national policy is "to follow local customs" with regard to serving Negroes and whites at its lunch counters (R. 22, 23).

Petitioners were tried and convicted in the Recorder's Court of Greenville before the City Recorder, sitting without a jury, and sentenced to pay a fine of one hundred dollars ($100.00) or serve thirty (30) days in the City jail (R. 2, 54).

Petitioners appealed the judgment of Recorder's Court to the Greenville County Court, which Court dismissed the appeal on March 17, 1961 (R. 57-60).

The Supreme Court of South Carolina entered its judgment, affirming the judgment and sentences below on November 10, 1961, *infra* pp. 5a-10a, and denied rehearing on November 30, 1961, *infra* p. 11a.

How the Federal Questions Were Raised

At the commencement of the trial in the Recorder's Court of the City of Greenville, petitioners moved to quash the informations and dismiss the warrants on the ground that the charge was too uncertain and indefinite to apprise petitioners of the charge against them, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 2, 3). The motion was denied by the Court (R. 3).

At the close of the prosecution's case, petitioners moved to dismiss the warrants against them:

> "The evidence presented on the charge shows conclusively that by arresting the defendants the officers were aiding and assisting the owners and managers of Kress' Five and Ten Cent Store, in maintaining their policies of segregating or excluding service to Negroes at its lunch counter . . . in violation of defendants' rights to due process of law, and equal protection of the laws, under the 14th Amendment to the United States Constitution" (R. 28, 29);
>
> "that the warrant which charges them with trespass after warning, the designation of the act being set forth as invalid, in that the evidence establishes merely that defendants were peacefully upon the premises of S. H. Kress & Company, which establishment is performing an economic function invested with the public interest as customers, visitors, business guests or invitees and there is no basis for the charge recited by the warrants other than an effort to exclude these defendants from the lunch counters of Kress' Five and Ten Cent Store, because of their race and color . . . thereby depriving them of liberty without due process

of law and equal protection of the laws secured to them by the 14th Amendment to the United States Constitution" (R. 29, 30);

"The designation of the act being set forth in the warrant under which all these defendants, who are Negroes, were arrested and charged is on the evidence unconstitutional as applied to the defendants, in that it makes it a crime to be on property open to the public after being asked to leave because of race and color in violation of the defendants' rights under the due process and equal protection clauses of the 14th Amendment to the United States Constitution" (R. 30).

These motions were denied by the Court (R. 29, 30).

Petitioners further moved for a dismissal on the ground that the City had not established a *prima facie* case (R. 30). This motion was denied (R. 30).

At the close of the trial, petitioners renewed all motions for dismissal made at the conclusion of the City's case (R. 52). These motions were again denied (R. 52). Further, petitioners moved for dismissal of the cases on the ground that:

"... the Negro defendants, were arrested and charged under a statute which is itself unconstitutional on its face, by making it a crime to be on public property after being asked to leave by an individual, at such individual's whim. In that, such statute does not require that the person making the demand to leave, present documents or other evidence of possessing a right sufficient to apprise the defendants of the validity of the demand to leave. All of which renders the statute so vague and uncertain, as applied to the defendants, as to violate their rights under the due process clause

of the 14th Amendment to the United States Constitution . . . "

This motion was denied by the Court (R. 53).

At the close of petitioners' trial, but before judgment, petitioners' counsel moved to place Greenville's segregation in eating facilities Ordinance in evidence for consideration in regard to the judgment (R. 53). The Court denied this motion (R. 54) but the Ordinance was placed in record on appeal (R. 56).

Subsequent to judgment, petitioners renewed all motions made prior thereto by moving for arrest of judgment or, in the alternative, a new trial (R. 54). The motion was not granted (R. 54, 55).

After considering petitioners' exceptions (R. 60), the Greenville County Court, on appeal held:

". . . the appeal should be dismissed because the prosecution was conducted under a valid constitutional statute and in addition the appeal should be dismissed upon the ground that S. H. Kress and Company has a right to control its own business. We think this position is fully sustained under the recent case of Williams v. Johnson, Res. 344, 268 Fed. (2d) 845 and the North Carolina case of State v. Nelson decided January 20, 1961 and reported in 118 S. E. (2d) at page 47" (R. 60).

In appealing to the Supreme Court of South Carolina, petitioners set forth the following exceptions to the judgment below (R. 61-63):

"1. The Court erred in refusing to hold that the warrant is vague, indefinite and uncertain and does not plainly and substantially set forth the offense charged, thus failing to provide appellants with suffi-

cient information to meet the charges against them as is required by the laws of the State of South Carolina, in violation of appellants' rights to due process of law, secured by the Fourteenth Amendment to the United States Constitution.

2. The Court erred in refusing to hold that the State failed to establish the corpus delicti.

3. The Court erred in refusing to hold that the State failed to prove a *prima facie* case.

4. The Court erred in refusing to hold that the evidence of the State shows conclusively that by arresting appellants the officers were aiding and assisting the owners and managers of S. H. Kress and Company in maintaining their policies of segregating or excluding service to Negroes at their lunch counters on the ground of race or color, in violation of appellants' right to due process of law and equal protection of the laws, secured by the Fourteenth Amendment of the United States Constitution.

5. The Court erred in refusing to hold that the evidence establishes merely that the appellants were peacefully upon the premises of S. H. Kress and Company, an establishment performing an economic function invested with the public interest as customers, visitors, business guests or invitees, and that there is no basis for the charge recited by the warrants other than an effort to exclude appellants from the lunch counter of said business establishment because of their race and color, thereby depriving appellants of liberty without due process of law and equal protection of the laws, secured by the Fourteenth Amendment to the United States Constitution.

6. The Court erred in refusing to hold that the statute appellants are alleged to have violated, to wit, Act No. 743 of the Acts and Joint Resolutions of the General Assembly of South Carolina for 1960 (R. 896, H. 2135), is unconstitutional on its face by making it a crime to be on public property after being asked to leave by an individual at such individual's whim and does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise appellants of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to appellants as to violate their rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

7. The Court erred in refusing to permit defendants' counsel to elicit relevant testimony concerning cooperation of Store Managers and Police in the City of Greenville, South Carolina in pursuing the store managers' policies, customs and practices of segregating or excluding Negroes from their lunch counters."

In disposing of petitioners' constitutional objections, the Supreme Court of South Carolina held that the charge in the warrant was "definite, clear and unambiguous" *infra* p. 7a; that "the act makes no reference to race or color and is clearly for the purposes of protecting the rights of the owners or those in control of private property. Irrespective of the reason for closing the counter, the evidence is conclusive that defendants were arrested because they chose to remain upon the premises after being requested to leave by the manager . . . and their constitutional rights were not violated when they were arrested for trespass," *infra* pp. 8a, 9a.

The Court disposed of Greenville's Ordinance requiring segregation in eating facilities as follows:

> "Upon cross-examination of Capt. G. O. Bramlette of the Greenville City Police Department, it was brought out that the City of Greenville has an ordinance making it unlawful for any person owning, managing, or controlling any hotel, restaurant, cafe, etc., to furnish meals to white persons and colored persons except under certain conditions; and Defendants contend that they were prosecuted under this ordinance; however, the warrant does not so charge and there is nothing in the record to substantiate this contention. The ordinance was made a part of the record upon request of defendants' counsel but defendants were not charged with having violated any of its provisions. The question of the validity of this ordinance was not before the trial Court and therefore not before this Court on appeal."

Reasons for Granting the Writ

The Court below decided this case in conflict with principles declared by this Court as is further set forth below:

I.

Petitioners were denied due process of law and equal protection of the laws by conviction of trespass in refusing to leave white lunch counter where their exclusion was required by City Ordinance.

Although formally charged with violation of South Carolina's trespass statute, petitioners were actually convicted of having violated the segregation policy of the City of Greenville. This policy is expressed in Section 31-8, Code

of Greenville, 1953, as amended 1958 Cumulative Supplement, see *supra* p. 3, making it unlawful ". . . to furnish meals to white persons and colored persons in the same room, or the same table, or at the same counter . . . " (R. 56-57).

G. W. West, the Manager of the department store, and a Kress employee for fifteen years[3] (R. 20) testified explicitly that exclusion of Negroes from the lunch counter and the closing of the counter when petitioners sought service; was caused by the City Ordinance requiring segregation in eating facilities (R. 25).

Confirmation that the police were enforcing segregation is indicated by the fact that some whites seated at the lunch counter during the demonstration remained seated and were not arrested (R. 34) although the announcement to leave was made in general terms (R. 19) and at least five policemen were present (R. 5, 6). Moreover, the counter was reopened as soon as petitioners were removed by the police (R. 25).

Further confirmation that the policy of enforcing segregation was the City's appears from how the arrests were made. The police proceeded to Department Store without requests to arrest by the management (R. 5), and arrested petitioners without a request from the management (R. 26). The manager of the store testified that arrest was entirely the decision of the police (R. 26) and it does not appear that the management signed any complaint against petitioners.

Prior to the demonstration, a representative of petitioers had discussed the question of service with the man-

[3] West came to live in Greenville on February 3, 1960, the day he became Manager of the Kress Store. Prior to this he worked for Kress in other Cities (R. 20, 21).

ager and had been told that the criminal process would not be invoked by the store (R. 43). This was not the first demonstration petitioners had held in Kress's (R. 44). When petitioners' counsel attempted to question the manager as to any agreement or arrangement he had made with the police prior to the closing of the lunch counter, the Court denied permission to proceed (R. 23, 24, 26).

On this record it is clear that Kress and Company would have been willing to cope with the controversy within the realm of social and economic give and take absent the Ordinance of the City of Greenville requiring segregation and the force of local customs supported by the City and the State of South Carolina.[4] If, as the manager testified, Kress & Company maintained the policy of segregation because of the Ordinance, then there can be no other conclusion than that the City, by the Ordinance and by arrest and criminal conviction, has "place[d] its authority behind discriminatory treatment based solely on color . . . " Mr.

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[4] There can be little doubt that segregation of the races had been and is the official policy of the State of South Carolina. Cf. S. C. A. & J. R. 1952 (47) 2223, A. & J. R. 1954 (48) 1695 repealing S. C. Const. Art. 11, §5 (1895) (which required legislature to maintain free public schools). S. C. Code §§21-761 to 779 (regular school attendance) repealed by A. & J. R. 1955 (49) 85; §21-2 (appropriations cut off to any school from which or to which any pupil transferred because of court order; §21-230(7) (local trustees may or may not operate schools); §21-238 (1957 Supp.) (school officials may sell or lease school property whenever they deem it expedient); S. C. Code §40-452 (1952) (unlawful for cotton textile manufacturer to permit different races to work together in same room, use same exits, bathrooms, etc., $100 penalty and/or imprisonment at hard labor up to 30 days; S. C. A. & J. R. 1956 No. 917 (closing park involved in desegregation suit); S. C. Code §§51-1, 2.1-2.4 (1957 Supp.) (providing for separate State Parks) §51-181 (separate recreational facilities in cities with population in excess of 60,000); §5-19 (separate entrances at circus); S. C. Code Ann. Tit. 58, §§714-720 (1952) (segregation in travel facilities).

Justice Frankfurter dissenting in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727. The City Ordinance is no abstract exhortation but obligatory by its terms, to which were attached criminal sanctions, and it is uncontradicted that one of the reasons Kress & Company chose a policy of racial segregation was because of the Ordinance.

The discriminatory practice of Kress, the request that petitioners leave and their arrest and conviction, result, therefore, directly from the formally enacted policy of the City of Greenville, South Carolina, and not (so far as this record indicates) from any individual or corporate business decision or preference of the management of the store to exclude Negroes from the lunch counter. Whatever the choice of the property owner may have been, here the City made the choice to exclude petitioners from the property through its segregation Ordinance. This City segregation policy was enforced by petitioners' arrests, convictions and sentences in the South Carolina courts.

The Supreme Court of South Carolina dismisses reference to the City segregation Ordinance by stating "The Ordinance was made a part of the record upon request of defendants' counsel but defendants were not charged with having violated any of its provisions." But the Constitution forbids "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275.[5]

By enacting, first, that persons who remain in a restaurant when the owner demands that they leave are "trespassers," and then enacting that restaurateurs may not

[5] Racial segregation imposed under another name often has been condemned by this Court. *Guinn* v. *U. S.*, 238 U. S. 347; *Lane* v. *Wilson*, *supra*; *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala. 1949) aff'd 336 U. S. 933; and see *Louisiana State University and A. & M. College* v. *Ludley*, 252 F. 2d (5th Cir. 1958) cert. denied 358 U. S. 819.

permit Negroes to remain in white restaurants, South Carolina has very clearly made it a crime (a trespass) for a Negro to remain in a white restaurant. The manager of Kress's admits as much when he testified that the lunch counter was closed and petitioners asked to leave because of the Ordinance (R. 25).

This case thus presents a plain conflict with numerous prior decisions of this Court invalidating state efforts to require racial segregation. *Buchanan* v. *Warley*, 245 U. S. 60; *Brown* v. *Board of Education*, 347 U. S. 483; *Gayle* v. *Browder*, 352 U. S. 903 aff'g 142 F. Supp. 707, 712 (M. D. Ala. 1956); *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877; *State Athletic Commission* v. *Dorsey*, 359 U. S. 533; cf. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715. Note the dissenting opinion of Judges Bazelon and Edgerton in *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 843 (D. C. Cir. 1961) (dealing primarily with the related issue of whether a proprietor excluding a Negro under an erroneous belief that this was required by state statute was liable for damages under the Civil Rights Act; the majority applied the equitable abstention doctrine). Indeed, *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 (4th Cir. 1959) relied upon by the Supreme Court of South Carolina below, indicated that racial segregation in a restaurant "in obedience to some positive provision of State law" would be a violation of the Fourteenth Amendment. See also *Boman* v. *Birmingham Transit Company*, 280 F. 2d 531 (5th Cir. 1960); *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961).

II.

The decision below conflicts with decisions of this Court securing the right of freedom of expression under the Fourteenth Amendment to the Constitution of the United States.

A. *The Enforcement of the State and City Segregation Policy and the Interference of the Police Violated Petitioners' Right to Freedom of Expression.*

Petitioners were engaged in the exercise of free expression, by verbal and nonverbal requests to the management for service, and nonverbal requests for nondiscriminatory lunch counter service, implicit in their continued remaining in the dining area when refused service. As Mr. Justice Harlan wrote in *Garner* v. *Louisiana*: "We would surely have to be blind not to recognize that petitioners were sitting at these counters, when they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." 7 L. ed. 2d at 235-36. Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. They did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other forms of expression in the store possibly inappropriate to the time and place. Rather they offered to purchase in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas" (*Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, *J.*, dissenting), within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education* v.

Barnette, 319 U. S. 624, 633-634 (flag salute); *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449 (freedom of association).

Questions concerning freedom of expression are not resolved merely by reference to the fact that private property is involved. The Fourteenth Amendment right to free expression on private property takes contour from the circumstances, in part determined by the owner's privacy, his use and arrangement of his property. In *Breard* v. *Alexandria*, 341 U. S. 622, the Court balanced the "householder's desire for privacy and the publisher's right to distribute publications" in the particular manner involved, upholding a law limiting the publisher's right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U. S. 141 where different kinds of interests led to a corresponding difference in result. Moreover, the manner of assertion and the action of the State, through its officers, its customs and its creation of the property interest are to be taken into account.

In this constitutional context it is crucial, therefore, that the stores implicitly consented to the protest and did not seek intervention of the criminal law. For this case is like *Garner* v. *Louisiana*, *supra*, where Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. Petitioners informed the management that there would be a protest and received assurance that the management would not resort to the criminal process. Petitioners were not asked to leave the counter until the police arrived and the manager talked with the police. It does not appear that anyone connected with the store signed an affidavit or complaint against petitioners. The police officer proceeded immediately to

arrest the petitioners without any request to do so on the part of anyone connected with the store.

In such circumstances, petitioners' arrest must be seen as state interference in a dispute over segregation at this lunch counter, a dispute being resolved by persuasion and pressure in a context of economic and social struggle between contending private interests. The Court has ruled that judicial sanctions may not be interposed to discriminate against a party to such a conflict. *Thornhill* v. *Alabama, supra; San Diego Bldg. Trades Council* v. *Garmon*, 349 U. S. 236.

But even to the extent that the store may have acquiesced in the police action a determination of free expression rights still requires considering the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action supports. *Marsh* v. *Alabama*, 326 U. S. 501.

In *Marsh*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company-town to proselytize, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama, supra*, involving picketing on company-owned property; see also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); *United Steelworkers* v. *N.L.R.B.*, 243 F. 2d 593, 598 (D. C. Cir. 1956), reversed on other grounds, 357 U. S. 357, and compare the cases mentioned above with *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U. S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 86

N. Y. S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it." See also *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by these trespass prosecutions is support of the property owner's discrimination, a policy which the manager testified was caused by the State's segregation custom and policy and the express terms of the City Ordinance. This is the most that the property owner can be found to have sought.

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the State has the right to prevent. *Schenck* v. *United States*, 249 U. S. 47, 62. The only "substantive evil" sought to be prevented by these trespass prosecutions is the stifling of protest against the elimination of racial discrimination, but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination. See *Cooper* v. *Aaron*, 358 U. S. 1; *Terminiello* v. *Chicago*, 337 U. S. 1; *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Circuit, 1957), cert. denied 332 U. S. 851.

B. *The Convictions Deny Petitioners' Right to Freedom of Expression in That They Rest on a Statute Which Fails to Require Proof That Petitioners Were Requested to Leave by a Person Who Had Established Authority to Issue Such Request at the Time Given.*

In the courts below petitioners asserted that the statute in question denied due process of law secured by the Fourteenth Amendment to the Constitution of the United States in that it did not require that the person requesting them to leave the lunch counter establish his authority to make the demand. Although raised and pressed below by petitioners, the Supreme Court of South Carolina failed to construe the statute to require proof that the person who requested them to leave establish his authority.

If in the circumstances of this case free speech is to be curtailed, the least one has a right to expect is reasonable notice in the statute under which convictions are obtained, to that effect. *Winters* v. *New York*, 333 U. S. 507. Here, absent a statutory provision that the person making the request to leave be required to communicate that authority to the person asked to leave, petitioners, in effect, have been convicted of crime for refusing to cease their protests at the request of a person who could have been a stranger. The stifling effect of such a rule on free speech is obvious. See *Wieman* v. *Updegraff*, 344 U. S. 183; *Smith* v. *California*, 361 U. S. 147.

The vice of lack of fair notice was compounded where, as here, petitioners were convicted under a statute which designated two separate crimes, see *supra* p. 3, and a warrant which failed to specify under which section the prosecution proceeded (R. 2). Moreover, the warrant and the trial court stated that petitioners were charged with "trespass after warning" (R. 2). (Section (1) of the Statute speaks of being "warned"; Section (2) "without having been warned"), but the prosecution offered no proof that

petitioners had been "warned" within six months as required by Section (1) and apparently proceeded on the theory that Section (2) of the statute was involved.

This record is barren of any attempt by the City of Greenville to prove that the person who requested petitioners to leave identified his authority to do so to petitioners, and the courts of South Carolina, although urged by petitioners, failed to require such proof. While one of the petitioners brought out, when questioned by her own counsel, that she had spoken to the manager previously,[6] there is no evidence that the other petitioners knew the authority of the person who gave the order to leave. With rights to freedom of expression at stake, the City should be required to provide clear and unambiguous proof of all the elements of the crime. Identification of authority to make the request to leave is all the more important because of the active role played by the police in this case, for if the police were enforcing segregation clearly petitioners had a right to remain at the counter. *Garner* v. *Louisiana*, *supra*.

No one ordinarily may be expected to assume that one who tells him to leave a public place, into which the proprietor invited him and in which he has traded, is authorized to utter an order to leave when no claim of such authority is made. This is especially true in the case of a Negro seating himself in a white dining area in Greenville, South Carolina—obviously a matter of controversy and one which any stranger, or the police of a city with a segregation ordinance, might be expected to volunteer strong views. If the statute in question is interpreted to mean that one must leave a public place under penalty of being held a criminal when so ordered to do so by a person who later turns

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[6] She also testified that the police, not the manager, gave the order for petitioners to leave. See Note 1, *supra*.

out to have been in authority without a claim of authority at the time, it means as a practical matter, that one must depart from public places whenever told to do so by anyone; the alternative is to risk fine or imprisonment. Such a rule might be held a denial of due process. Cf. *Lambert* v. *California*, 335 U. S. 225. But if such is the rule the statute gives no fair warning. *Winters* v. *New York*, *supra*; *Burstyn* v. *Wilson*, 343 U. S. 495; *Saia* v. *New York*, 334 U. S. 558; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. Absent such notice, petitioners surely were entitled to assume that one may go about a public place under necessity to observe orders only from those who claim with some definiteness the right to give them.

Indeed, as a matter of due process of law, if it is the rule one must obey all orders of strangers to leave public places under penalty of criminal conviction if one uttering the order later turns out to have had authority, petitioners are entitled to more warning of its harshness than the statute's text affirmed. Cf. *Connally* v. *General Construction Co.*, 269 U. S. 385; *Lanzetta* v. *New Jersey*, 306 U. S. 451. Otherwise many persons—like these petitioners—may be held guilty of crime without having intended to do wrong. This Court has said, however, that:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. Morrissette v. U. S., 342 U. S. 246, 250.

Morrissette, of course, involved a federal statute as treated in the federal courts. But it expresses the fundamental view that *scienter* ought generally to be an element in criminality. See Sayre, *Public Welfare Offenses*, 33 Columbia L. Rev.

55, 55-6 (1933). The pervasive character of *scienter* as an element of crime makes it clear that a general statute like the ordinance now in question, in failing to lay down a *scienter* requirement, gives no adequate warning of an absolute liability. Trespass statutes like the one at bar are quite different from "public welfare statutes" in which an absolute liability rule is not unusual. See *Morrissette v. United States, supra*, 342 U. S. at 252-260.

On the other hand, however, if South Carolina were to read a *scienter* provision into this ordinance for the first time—which it has failed to do although the issue was squarely presented in this case—the lack of the necessary element of guilt, notice of authority, would require reversal under authority of *Garner v. Louisiana, supra; Thompson v. City of Louisville*, 362 U. S. 199.

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
CONSTANCE BAKER MOTLEY
JAMES M. NABRIT, III
MICHAEL MELTSNER
10 Columbus Circle
New York 19, New York

MATTHEW J. PERRY
LINCOLN C. JENKINS, JR.
1107½ Washington Street
Columbia 1, South Carolina

WILLIE T. SMITH
Greenville, South Carolina

Attorneys for Petitioners

APPENDIX

Order

IN THE

GREENVILLE COUNTY COURT

JAMES RICHARD PETERSON, ET AL.,

—v.—

CITY OF GREENVILLE.

APPEAL FROM THE RECORDER'S COURT
OF THE CITY OF GREENVILLE

This is an appeal to this Court from the Recorder's Court of the City of Greenville.

The Defendants were tried on August 11, 1960, in the Greenville City Recorder's Court before the Recorder, John V. Jester, upon a charge of violating the Act of May 20, 1960, which in substance makes any person a trespasser who refuses to leave the premises of another immediately upon being requested to leave.

The Act is very simple and plain in its language.

It appears that on August 9, 1960, the ten Defendants, who are making this appeal, with four other young Negro youths went to the store of S. H. Kress and Company and seated themselves at the lunch counter at the store. At the trial there seemed to be some attempt to minimize the evidence of the officers involved as to whether or not the Defendants, now Appellants, refused to leave the premises immediately upon the request of the store manager that

they should leave. However, in the argument of the chief counsel for the Appellants, all question of doubt in this respect is resolved in favor of the City. According to the written Brief of the Defendants, the Defendants now "seated themselves at the lunch counter where they sought to be served. They were not served and, in fact, were told by the management that they could not be served and would have to leave. The Defendants refused to leave and remained seated at the lunch counter."

The act clearly makes it a criminal offense for any person situated as the Defendants were to refuse or fail to "*immediately*" depart upon request or demand.

Therefore, the main question before this Court is whether or not the Appellants were lawfully tried on a charge of violating this Act by refusing to leave the lunch counter immedately when requested to do so.

In the oral argument counsel for the Appellants seemed to reply in a vague manner upon an "unconstitutional application" of the Statute.

As the Court views the statute it was merely a statutory enlargement and re-enactment of the common law in South Carolina which has been recognized for more than a half century to the effect that when a property owner, whether it be a dwelling house or place of business, has the right to order any person from the premises whether they be an invitee or an uninvited person. This principle of law was fully and clearly reaffirmed by the Supreme Court of South Carolina in the recent case of *State* v. *Starner, et al.*, 49 S. E. (2d) 209.

For scores of years South Carolina has had a number of Statutes with reference to the law of trespass. They are now embodied as Article 5, Code of 1952, embracing Sections 16-381 to 16-394. Section 17-286 particularly refers to trespasses after notice.

Therefore, the Act of May 20, 1960, now designated in the 1952 Code as Sec. 17-388 is the controlling factor here. There can be no doubt that the field into which the Legislature entered by the enactment of this particular law was a well recognized portion of the law of the State of South Carolina. The Constitutionality of the Act cannot be questioned.

Every presumption will be made in favor of the Constitutionality of a statute. There are more than fifty decisions by the Supreme Court of South Carolina to this effect. The United States Supreme Court in many cases has recognized that there is a presumption in favor of the constitutionality of an Act of Congress or of a State or Municipal legislative body. In the case of *Davis* v. *Department of Labor*, 317 U. S. 255, 87 Law Ed. 250, the United States Supreme Court held that there is a presumption of constitutionality in favor of State statutes. Time and time again the Supreme Court of South Carolina has held "the law is well settled that the burden is on the person claiming the Act to be unconstitutional to prove and show that it is unconstitutional beyond a reasonable doubt". *McCollum* v. *Snipes*, 49 S. E. 12, 213 S. C. 254.

In 16 C. J. S. 388, we find this language, "Statutes are presumed to be valid and a party attacking a statute as unconstitutional has the burden of proof". Over five hundred decisions from all over the United States are cited to support this statement of the law.

The argument of counsel for the Appellants failed to raise a single serious question as to the constitutionality of the statute.

Counsel for Appellants insisted upon the right of the Defendants to adduce evidence of some alleged conspiracy or plan on the part of the officers of the law and store

management to bring about this prosecution. We think the sole issue in the Recorder's Court was whether or not the Defendants were guilty of violating the Act in question. They now boldly admit through counsel that they defied the management of the store and refused to leave when requested. Had they departed from the store immediately, as the law requires they should have, there would have been no arrest, but apparently in accordance with a preconceived plan they all kept their seats and defied the management and refused to leave the premises.

Evidence of any other motive on the part of the management would have thrown no light on this case.

In my opinion the appeal should be dismissed because the prosecution was conducted under a valid constitutional statute and in addition the appeal should be dismissed upon the ground that S. H. Kress and Company had a right to control its own business. We think this position is fully sustained under the recent case of *William* v. *Johnson*, Res. 344, 268 Fed. (2d) 845, and the North Carolina case of *State* v. *Nelson*, decided January 20, 1961, and reported in 118 S. E. (2d) at page 47.

I carefully considered all the exceptions made by the Appellants and I am unable to sustain any of them. It is, therefore,

ORDERED, ADJUDGED AND DECREED that the Appeal be dismissed.

JAMES H. PRICE,
Special Judge,
Greenville County Court.

March 17, 1961.

Opinion

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CITY OF GREENVILLE,

Respondent,

—v.—

JAMES RICHARD PETERSON, YVONNE JOAN EDAY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT and ROSE MARIE COLLINS,

Appellants.

Appeal From Greenville County

James H. Price, Special County Judge

Case No. 4761

Opinion No. 17845

Filed November 10, 1961

TAYLOR, *C.J.*: Defendants were convicted of the charge of trespass after notice in violation of Section 16-388, Code of Laws of South Carolina, 1952, as amended, and appeal. By agreement of counsel, all bail bonds were continued in effect pending disposition of this appeal.

On August 9, 1960, in response to a call, law enforcement officers were dispatched to the S. H. Kress Store in Greenville, South Carolina, a member of a large chain of

stores operated throughout the United States and described as a junior department store. Upon arrival they found the ten defendants and four others who were under sixteen years of age, all Negroes, seated at the lunch counter. There is testimony to the effect that because of the local custom to serve white persons only at the lunch counter the manager of the store announced that the lunch counter was closed, the lights were extinguished, and all persons were requested to leave. The white persons present left, but all Negroes refused to leave; and those above the age of sixteen were thereupon charged with trespass after notice as provided in the aforementioned section of the Code, which provides:

> "Any person:
>
> "(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or
>
> "(2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,
>
> "Shall, on conviction, be fined not more than one hundred dollars or be imprisoned for not more than thirty days."

Defendants contend, first, error in refusing to dismiss the warrant upon the ground that the charge contained therein was too indefinite and uncertain as to apprise the

defendants as to what they were actually being charged with.

Defendants were arrested in the act of committing the offense charged, they refused the manager's request to leave after the lunch counter had been closed and the lights extinguished, and there could have been no question in defendants' minds as to what they were charged with. Further, there was at that time no claim of lack of sufficient information, and upon trial there was no motion to require the prosecution to make the charge more definite and certain. Defendants rely upon State v. Randolph, et al., —— S. C. ——, 121 S. E. (2d) 349, where this Court held that it was error to refuse defendants' motion to make the charge more definite and certain in a warrant charging breach of the peace. It was pointed out in that case that breach of the peace embraces a variety of conduct and defendants were entitled to be given such information as would enable them to understand the nature of the offense. This is not true in instant case where the charges were definite, clear and unambiguous; further, no motion was made to require the prosecution to make the charge more definite and certain. There is no merit in this contention.

Defendants next contend that their arrest and conviction was in furtherance of a custom of racial segregation in violation of the Fourteenth Amendment to the Constitution of the United States.

Defendants entered the place of business of the S. H. Kress Store and seated themselves at the lunch counter, they contend, for the purpose of being served, although four of them had no money and there is no testimony that such service was to be paid for by others.

The testimony reveals that the lunch counter was closed because it was the custom of the S. H. Kress Store in

Greenville, South Carolina, to serve whites only and after all persons had left or been removed the lunch counter was reopened for business. The statute with no reference to segregation of the races applies to "Any person: * * * Who fails and refuses without cause or good excuse * * * to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative, * * * " The act makes no reference to race or color and is clearly for the purpose of protecting the rights of the owners or those in control of private property. Irrespective of the reason for closing the counter, the evidence is conclusive that defendants were arrested because they chose to remain upon the premises after being requested to leave by the manager.

Defendants do not attack the statute as being unconstitutional but contend that their constitutional rights were abridged in its application in that they were invitees and had been refused service because of their race. The cases cited do not support this contention while there are a number of cases holding to the contrary. See Hall v. Commonwealth, 188 Va. 72, 49 S. E. (2d) 369, 335 U. S. 875, 69 S. Ct. 240, 93 L. Ed. 418; Henderson v. Trailway Bus Company, D. C. Va., 194 F. Supp. 423; State v. Clyburn, 247 N. C. 455, 101 S. E. (2d) 295; State v. Avent, 253 N. C. 580, 118 S. E. (2d) 47; Williams v. Howard Johnson Restaurant, 4 Cir., 268 F. (2d) 845; Slack v. Atlantic White Tower System, Inc., D. C. Md., 181 F. Supp. 124, 4 Cir., 284 F. (2d) 746; Griffin v. Collins, D. C. Md., 187 F. Supp. 149; Wilmington Parking Authority v. Burton, Del., 157 A. (2d) 894; Randolph v. Commonwealth, —— Va. ——, 119 S. E. (2d) 817. The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful, Shelley v. Kraemer, 334 U. S. 1,

68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. (2d) 441; and the operator of a privately owned business may accept some customers and reject others on purely personal grounds in the absence of a statute to the contrary, Alpaugh v. Wolverton, 184 Va. 943, 136 S. E. (2d) 906. In the absence of a statute forbidding discrimination based on race or color, the operator of a privately owned place of business has the right to select the clientele he will serve irrespective of color, State v. Avent, 253 N. C. 580, 118 S. E. (2d) 47. Although the general public has an implied license to enter any retail store the proprietor or his agent is at liberty to revoke this license at any time and to eject such individual if he refuses to leave when requested to do so, Annotation 9 A. L. R. 379; Annotation 33 A. L. R. 421; Brookshide Pratt Mining Co. v. Booth, 211 Ala. 268, 100 So. 240, 33 A. L. R. 417; and may lawfully forbid any and all persons, regardless of reason, race or religion, to enter or remain upon any part of his premises which are not devoted to public use, Henderson v. Trailway Bus Company, 194 F. Supp. 426.

The lunch counter was closed, the lights extinguished, and all persons requested to quit the premises. Defendants refused and their constitutional rights were not violated when they were arrested for trespass.

Upon cross-examination of Capt. G. O. Bramlette of the Greenville City Police Department, it was brought out that the City of Greenville has an ordinance making it unlawful for any person owning, managing, or controlling any hotel, restaurant, cafe, etc., to furnish meals to white persons and colored person except under certain conditions; and Defendants contend that they were prosecuted under this ordinance; however, the warrant does not so charge and there is nothing in the record to substantiate

this contention. The ordinance was made a part of the record upon request of defendants' counsel but defendants were not charged with having violated any of its provisions. The question of the validity of this ordinance was not before the trial Court and therefore not before this Court on appeal.

Defendants further contention that the prosecution failed to establish the corpus delicti is disposed of by what has already been said.

We are of opinion that the judgment and sentences appealed from should be affirmed; and IT IS SO ORDERED. AFFIRMED.

OXNER, LEGGE, Moss and LEWIS, *JJ.*, concur.

Certificate

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Case No. 6032

CITY OF GREENVILLE,

Respondent,

—against—

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT and ROSE MARIE COLLINS,

Appellants.

I, Harold R. Boulware, hereby certify that I am a practicing attorney of this Court and am in no way connected with the within case. I further certify that I am familiar with the record of this case and have read the opinion of this Court which was filed November 10, 1961, and in my opinion there is merit in the Petition for Rehearing.

/s/ HAROLD R. BOULWARE

The Court neither overlooked nor misapprehended any of the facts set forth herein. Therefore the Petition is denied.

/s/ C. A. TAYLOR, *C.J.*

/s/ G. DEWEY OXNER, *A.J.*

/s/ LIONEL K. LEGGE, A.J.

/s/ JOSEPH R. MOSS, *A.J.*

/s/ J. WOODROW LEWIS, *A.J.*

Columbia, South Carolina
November 16, 1961.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 77

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT AND ROSE MARIE COLLINS, PETITIONERS,

versus

CITY OF GREENVILLE, RESPONDENT

BRIEF OF THE RESPONDENT, CITY OF GREENVILLE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS A. WOFFORD,
THEODORE A. SNYDER, JR.,
200 Masonic Temple,
Greenville, South Carolina,

W. H. ARNOLD,
City Attorney,
Lawyers Building,
Greenville, South Carolina,

H. F. PARTEE,
Assistant City Attorney,
Greenville, South Carolina,
Attorneys for Respondent.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 750

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT AND ROSE MARIE COLLINS, PETITIONERS,

versus

CITY OF GREENVILLE, RESPONDENT

BRIEF OF THE RESPONDENT, CITY OF GREENVILLE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The petitioners invoke the jurisdiction of the Supreme Court of the United States pursuant to Title 28 U. S. Code, Section 1257 (3), upon the ground of deprivation of rights, privileges and immunities claimed by them under the Constitution of the United States. The respondent, City of Greenville, objects to the jurisdiction of this Court on the ground that no substantial Federal question was presented at any stage of the proceedings below and upon the ground that the issues below involved property rights only and the petitioners were not deprived of any rights, privileges or immunities secured by the Constitution of the United States.

QUESTIONS PRESENTED

The respondent, City of Greenville, denies that the petitioners have been deprived of any rights secured to them by the United States Constitution. However, for the purpose of argument, the respondent will assume that the questions to be considered are those presented by the petitioners as modified below.

The respondent, subject to its reservations, submits that the questions presented are as follows:

Whether Negro petitioners were denied due process of law and equal protection of the laws as secured by the Fourteenth Amendment to the Constitution of the United States:

1. When arrested and convicted of trespass for refusing to leave a department store lunch counter after demand was made for them to depart by the manager of the store.

2. Whether petitioners, as "sit-in" demonstrators, were denied their First Amendment freedom of speech right as secured by the Fourteenth Amendment when (a) convicted of trespass upon refusal to move from a lunch counter which was reserved for the use of white persons and (b) when the convictions rest on a statute which does not specifically require proof that petitioners were requested to leave by a person who had established his authority to issue such request at the time of making the request.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Constitutional and statutory provisions cited by the petitioners on page 3 of the Petition this case involves the First Amendment to the Constitution of the United States.

RESPONDENT'S STATEMENT OF THE CASE

The petitioners were each tried and convicted in the Recorder's Court of the City of Greenville, South Carolina. They were charged with violating Act No. 743 of the 1960 South Carolina General Assembly, R 896, H 2135, now Section 16-388, Code of Laws of South Carolina, 1952. The statute, in pertinent part, provides that: "Any person: * * * (2) who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative, shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days." This Act was approved by the Governor on the 16th day of May, 1960 and took effect 30 days later, or the 15th day of June, 1960. On August 9, 1960 at approximately 11:00 A. M. the petitioners entered the S. H. Kress & Company department store in the City of Greenville and took seats at the lunch counter in that store (R. 5). Only one of the petitioners testified as to placing any order for service (R. 41). Four of the petitioners had no money at all in their possession (R. 7, 8) and the one who did place an order refused to state that any of the others had placed an order (R. 46). It is apparent that the real purpose of the petitioners in being in the Kress store was to put pressure on the manager by way of a demonstration (R. 43). One of the Petitioners testified that this was only one of several demonstrations in the same store and lunch counter (R. 44). There is no evidence that any of the petitioners had previously been served at this particular lunch counter on any occasion. The only reasonable inference is that on the occasion of the prior demonstrations service had been refused them.

On the date of the commission of the offenses herein complained of the petitioners seated themselves at a lunch counter which had space for fifty-nine persons. The petitioners were advised that Negroes were not served at that counter (R. 41). The lights were extinguished and G. W. West, the manager of the store, requested that everyone leave (R. 19). All the white people who had been present left pursuant to this request, leaving behind the petitioners herein (R. 20). The petitioners did not leave and after a wait of approximately five minutes (R. 20), they were arrested and charged with violation of the trespass after notice statute which has been referred to. Their convictions subsequently were reviewed by the Supreme Court of South Carolina and from the decision of that Court sustaining the convictions, they petition this Court for a Writ of Certiorari.

ARGUMENT

I

The Petitioners were not deprived of the due process of law and equal protection of the laws secured to them by the Fourteenth Amendment in their trial and conviction for trespass.

The real issue in this case is whether or not a landowner has a right by virtue of his property ownership to say who may and who may not come upon or remain upon his premises. We reach the question left open in *Garner v. Louisiana*, 368 U. S. 157, 164 and footnote 11, the question "whether or not a private property owner and proprietor of a private establishment has the right to serve only those whom he chooses and to refuse to serve those whom he desires not to serve for whatever reason he may determine."

The S. H. Kress & Company operates a variety or junior department store in the City of Greenville. In the

building housing the store there have been set up some fifteen to twenty departments, including a lunch counter. In these departments are sold approximately ten thousand items (R. 21, 22). The decision as to what items are to be offered for sale is the result of a business judgment, made by a trained and experienced management. These decisions are made with the calculated business purpose in view of earning a profit. Some items sold are offered because there is an existing demand for them. As to other items the management seeks to create a demand by display and advertising. It has no monopoly and no one is required to buy anything from it. Nor is S. H. Kress & Company a public utility. It was not required to obtain a certificate of public convenience before opening the doors of its store in Greenville. It requires the consent of no one if it desires to close its doors and move away. The only license it is dependent upon is the continued good will of the buying public. No one can complain if its clerks are obnoxious, or if it refuses to sell certain items or insists on selling certain others.

Likewise, a private business such as the S. H. Kress & Company may regulate its opening and closing hours for daily business. Whether as lessee or as owner in fee simple, the private proprietor has the right to exclude everyone when the store is closed. His dominion over the premises is absolute.

Thus it will be seen that the proprietor has two rights in the situation presented in the case at bar. He has the right to do business with whom he pleases, and he has the right to control and possession of the premises whereon he conducts his business.

The right to select business clients.

The necessary parties to any private business selling transaction are a willing buyer and a willing seller. If one of the parties is unwilling, no measure of willingness on

the other side can make up the deficiency and force the sale. No law compels either party to go through with the transaction. The general rule of the common law, which is in effect in South Carolina, is that properietors of private enterprises are under no obligation to serve without discrimination all who seek service, but on the contrary enjoy an absolute power to serve whom they please. This was expressly held below to be the law of South Carolina, there being no statute to the contrary. (Petitioners' appendix, 9a.) The right of a proprietor, other than an innkeeper or common carrier, to do business with whom he pleases, and to refuse to do business with others, for any reason, or for no reason at all, has been consistently and uniformly held by the courts of this country, in the absence of legislation to the contrary. Annotation, 1 A. L. R. (2d) 1165. The refusal of a proprietor to do business with any prospective customer can be based on the rankest of discrimination, either of race, color or creed, or on some whim unreasonable or even fanciful. As was said in *State v. Clyburn*, 247 N. C. 455, 101 S. E. (2d) 295:

> "The right of an operator of a private enterprise to select the clientile he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. *Madden v. Queens County Jóckey Club*, 269 N. Y. 249, 72 N. E. (2d) 697, 1 A. L. R. (2d) 1160; *Terrell Wells Swimming Pool v. Rodriguez*, Tex. Civ. App. 182 S. W. (2d) 824; *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N. W. 589, 24 L. R. A., NS 447; *Younger v. Judah*, 111 Mo. 303, 19 S. W. 1109, 16 L. R. A. 558; *Goff v. Savage*, 122 Wash 194, 210 P. 374; *DeLaYsla v. Publix Theatres Corporation*, 82 Utah 598, 26 P. (2d) 818; *Brown v. Meyer Sanitary Milk Co.*, 150 Kan. 931, 96 P. (2d) 651; *Horn v. Illinois Cent. R. Co.*, 327 Ill. App. 498, 64 N. E. (2d) 574; *Coleman v. Middlestaff*, 147 Cal. App. (2d) Supp. 833, 305 P. (2d) 1020; *Fletcher v. Coney Island*, 100 Ohio App.

259, 136 N. E. (2d) 344; *Alpaugh v. Wolverton*, 184 Va. 943, 36 S. E. (2d) 906."

Mr. Justice Holmes recognized the principle in *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 256, where he said:

> "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing on the welfare of the community in which it is passed. But, however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes * * *."

The refusal of a restaurateur to serve a prospective patron because of his color has been held in several recent decisions to deprive a Negro of none of the rights, privileges or immunities secured to a citizen by the Constitution of the United States, and protected from the infringement by the Civil Rights Act, Title 42, United States Code, Section 1983. *Williams v. Howard Johnson's Restaurant*, 268 F. (2d) 845 (4th Cir.); *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (D. C. Md.), affd., 284 F. (2d) 746 (4th Cir.). In the *Williams v. Howard Johnson's case* the Fourth Circuit Court held there was a distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of a state in accordance with their own desires and social practices. The latter, it was held, deprived no one of any civil rights. That permissible area of voluntary selection of customers is what is presented by the facts of the instant case. The manager of the store testified that the practice of serving only white persons was in conformity with a policy of the company to follow local customs. The policy was made at the company's head-

quarters, and was obviously dictated by business reasons. (R. 22, 23, 25.) [1]

Since the manager of Kress' store was acting for it enforcing its voluntarily imposed policy, he had an absolute right to refuse to serve the petitioners herein.

Indeed, in the *Civil Rights Cases*, 109 U. S. 3, this Court held unconstitutional the section of the Civil Rights Act of 1875 providing that all persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, theaters, and other places of public amusement, with penalty for one who denied same to a citizen. One of the vices in the statute was that it laid down rules for the conduct of individuals in society towards each other, and imposed sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities. The person supposedly injured, it was said, would be left to his state remedy. And in the instant case, as we have stated, the common law is in effect and gives no right to the petitioners or anyone else to be served without the consent of the restaurateur or proprietor of a business.

The Court has continued to recognize that individuals have the right in their purely private day to day dealings to associate and discriminate as they see fit, for whatever reason is to their own minds satisfactory. The court specifically stated in *Shelley v. Kraemer*, 334 U. S. 1:

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[1] It is equally clear that the ordinance of the City of Greenville requiring segregation in eating places (R. 56, 57) had no bearing on the instant case. The validity of this ordinance has never been tested. It is clear, however, that if it is unconstitutional, any action taken pursuant to its mandate would be personal, and taken at the risk of personal liability on the part of the person so acting. *Gross v. Rice*, 71 Maine 241; *Sumner v. Beeler*, 50 Ind. 341; *Meyers v. Anderson*, 238 U. S. 368. The police captain who made the arrests testified he did not have the ordinance in mind (R. 10); in fact he was of the opinion it had been superseded (R. 17), and was not then in effect.

> "Since the decision of this Court in the Civil Rights cases, . . . the principle has become embedded in our constitutional law that the action inhibited by the first section of the Fourteenth amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

Similarly, in *Boynton v. Virginia*, 364 U. S. 454, this Court held that a bus station restaurant was required to serve all who sought service without discrimination, under the Interstate Commerce Act, where the restaurant was an integral part of a bus company's interstate transportation service. The Court made this reservation:

> "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that act."

The instant case falls squarely within the reservation. The S. H. Kress & Company in Greenville, South Carolina, provides only a local restaurant service. Its facilities are not connected to or with any business affected with a public interest. As a purely private business venture, it is and was legally entitled to refuse service to the petitioners herein.

The right to exclusive possession of business premises.

Ownership of real estate, whether a fee simple, a life estate, or a term for years is basically a right to its possession. From the right of possession follows the right of the owner to make whatever use of the premises that suits his fancy. Anyone who enters without his permission is a trespasser. The civil action for damages for trespass **quare clausum fregit** is founded on plaintiff's possession, and it is for injury to that possession that damages are awarded. *Grimke v. Brandon*, 1 Nott & McCord 356 (10 S. C. Law); *Lyles v. Fellers*, 138 S. C. 31, 136 S. E. 18.

It has always been the law that a person in possession is entitled to maintain that possession, even by force if necessary.

> "A man who attempts to force himself into another's dwelling, or who, being in the dwelling by invitation or license refuses to leave when the owner makes that demand, is a trespasser, and the law permits the owner to use as much force, even to the taking of his life, as may be reasonably necessary to prevent the obtrusion or to accomplish the explusion." *State v. Bradley,* 126 S. C. 528, 120 S. E. 248.

Of course, away from the dwelling, the right to kill in ejecting a trespasser does not exist. Still, it is the law of South Carolina that any person in the rightful possession of land may approach any person wrongfully thereon, and order him to leave or quit the land, and in the event of a refusal to do so, may use such force as may be necessary to eject such trespasser. *State v. Bodie,* 33 S. C. 117, 11 S. E. 624; *State v. Williams,* 76 S. C. 135, 56 S. E. 783; *Shramek v. Walker,* 152 S. C. 88, 149 S. E. 331. In ejecting such trespassers gentle force must be used, *State v. Brooks,* 79 S. C. 144, 60 S. E. 518.

The policy of the law does not favor the use of force and firearms by persons in possession of land who seek to remove trespassers. The charge in *State v. Lightsey,* 43 S. C. 114, 20 S. E. 975 expresses it thus:

> "But I charge you a man has no right to take his gun and run a man off his place. That is simply taking the law into his own hands."

As a substitute for the strong armed ejectment by the person in possession, the law of this state has for many years provided a calm judicial mode of ejectment, employing the more even temperaments of impartial law enforcement officers and judges. Thus the law has provided for many years that malicious injury to real property should

be a misdemeanor. Code of Laws of South Carolina, 1952, Section 16-382. Since 1866 our State has made entry on lands of another after notice prohibiting such entry a misdemeanor. Code of Laws of South Carolina, 1952, Section 16-386. It has never been suggested that these laws were intended other than for the protection and preservation of property rights. The opinions of our Court in South Carolina have strongly intimated that a person in possession of property should not take the law in his own hands in removing trespassers, but on the contrary they are exhorted to seek the aid and protection of the courts, by prosecuting the trespasser for these misdemeanors. *State v. Lightsey, supra.*

It may be objected that the statutory law of South Carolina until 1960 provided only for prosecutions for entry after notice. But the court in *State v. Bradley, supra,* indicated otherwise. There, quoting *State v. Lightsey, supra,* the court said that if a man warns another off his place, and that man comes on it, or refuses to leave, he is guilty of a crime, a misdemeanor, and for that misdemeanor he may be tried in court. The 1960 Act, under which petitioners were tried and convicted, adds nothing to the substance of the existing law. It merely clarifies and provides expressly for the misdemeanor of trespass by one who refuses to leave on being requested to do so. It made positive what the court had held in *State v. Bradley, supra,* was impliedly a part of the law prohibiting entry after notice.

With respect to country and farm lands, no one may enter them without permission. With respect to a store building, or business premises, the proprietor or operator expects and invites prospective customers to enter. This is a sort of permission which renders the original entry rightful and not a trespass. Business invitees are often spoken of as licensees, license being nothing more than a mere grant of permission. Ordinarily it is implied from

the opening of the doors of a business establishment. Such a license is always revocable, and when revoked the licensee becomes a trespasser if he does not immediately depart. In the annotation, 9 A. L. R. 379, it is put as follows:

> "It seems to be well settled that although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so."

In *Brookside-Pratt Mining Co. v. Booth*, 211 Ala. 268, 100 So. 240, the Court held that the proprietor of a store would not be liable for damages for assault and battery in ejecting a prospective patron from his store, when he did not desire to transact business with the person, and he had notified him to leave but was met with a refusal to do so, after giving him a reasonable time in which to depart.

The petitioners in this case found themselves in the identical situation. The manager of the store revoked their license or privilege to be there, and directed them to leave. (R. 19, 20.) After five minutes had passed, the petitioners still had not moved, although other persons originally present had departed when requested to leave. (R. 20.) At the end of that interval, the S. H. Kress & Company had a right to remove the petitioners by force. It is not contended that the petitioners were not given a reasonable time in which to depart, and the finding of the courts below on that element of the offense is conclusive. But our law does not favor persons in possession of property taking the law into their hands to eject trespassers. *State v. Bradley, supra; State v. Lightsey, supra.* The law made the conduct of the petitioners a misdemeanor. The law favors their removal by the forces of law and trial by the orderly processes of a court of justice.

The only purpose of the law in this case is to protect the rights of the owners or those in lawful control of private property. It protects the right of the person in possession to forbid entrance to those he is unwilling to receive and to exclude them if, having entered, he sees fit to command them to leave. *Hall v. Commonwealth*, 188 Va. 72, 49 S. E. (2d) 369, app. dismissed, 335 U. S. 875, Reh. den. 335 U. S. 912. As Mr. Justice Black said in *Martin v. City of Struthers*, 319 U. S. 141:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off."

Of course, the police officers had a right and a duty to arrest for the misdemeanor committed in their presence.

The petitioners contend that their arrest and trial by the city police and in the city court was state action which deprived them of Fourteenth Amendment rights. There is no inference that the law involved or the other trespass laws have been applied to Negroes as a class or to these petitioners to the exclusion of other offenders. Certainly they were not deprived of any rights in being removed from the Kress store, a place where they had no right to remain under the law, after being requested to leave. Granted the right of a proprietor to choose his customers and to eject trespassers, it can hardly be the law, as petitioners contend, that the proprietor may use such force as he and his employees possess, but may not call on a peace officer to protect his rights. *Griffin v. Collins*, 187 F. Supp. 149 (D. C. Md.); *Henderson v. Trailways Bus Company*, 194 F. Supp. 423 (E. D. Va.). A right which cannot be protected and enforced through the judicial machinery is a non-existent right.

In this there is no conflict with any prior decisions of this Court. The cases cited by petitioners all involve state

action on state owned or operated premises, state-furnished services, and common carriers. None of them involve purely private action taken in respect of property rights to private property. We submit that the only constitutional right involved in this case is the right of a property owner to the free and untrammelled use of his premises in whatever manner he sees fit.

II

The decision of Supreme Court of South Carolina is in accord with the decision of this Court securing the right of freedom of speech under the Fourteenth Amendment.

A. **The conviction of petitioners of trespass after their refusal to move from a lunch counter in a private store did not interfere with their freedom of speech.**

When the petitioners use the term "freedom of expression" we assume they have in mind freedom of speech, which is protected from abridgment by Congress by the First Amendment to the Constitution of the United States. Since 1925, the First Amendment freedom of speech has been regarded as an aspect of "liberty" which under the Fourteenth Amendment the States are prohibited from taking away without due process of law. *Gitlow v. New York,* 268 U. S. 652; *Fiske v. Kansas,* 274 U. S. 380.

Freedom to expound one's views and distribute information to every citizen wherever he desires to receive it is clearly vital to the preservation of a free society. *Martin v. Struthers,* 319 U. S. 141. This freedom gives the right to the person who would speak to try and convince others of the correctness of his ideas and opinions. The title to streets and parks has immemorially been held in trust for the use of the public, and time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. The streets are natural and proper places for the dissemination of infor-

mation and opinion. *Schneider v. State*, 308 U. S. 147; *Hague v. C. I. O.*, 307 U. S. 496; *Thornhill v. Alabama*, 310 U. S. 88. Even where the streets and parks are privately owned, as in company towns, citizens have a right to go upon them to communicate information, unimpeded by trespass statutes. *Marsh v. Alabama*, 326 U. S. 501; *Tucker v. Texas*, 326 U. S. 517. Even freedom of speech on the public streets is subject to some control. *Saia v. New York*, 334 U. S. 558. In *Beauharnais v. Illinois*, 343 U. S. 250, this Court held that a person expressing his honest convictions on the streets could be prosecuted under a state group libel statute.

When we leave the streets, and consider the right to freedom of speech on private property, we find that the courts have unanimously held that the right of freedom of speech must yield to the property right of the landowner to eject trespassers. In *Hall v. Commonwealth*, 118 Va. 72, 49 S. E. (2d) 369; app. dism. 335 U. S. 875; reh. den. 335 U. S. 912, the conviction of a member of a religious sect for trespass under a statute similar to the one here was upheld. The right of the individual to freedom of speech had to yield, it was held, to the property rights of the owner of an apartment building and its tenants. There was no right for anyone, over their objection, to insist on using the inner hallways to distribute their views and information. The refusal of those persons to depart after being requested to do so, was held to justify their conviction for trespass. The court stated that inner hallways of apartment houses were not to be regarded in the same light as public roads; they emphatically do not constitute places of public assembly, or for communicating thoughts one to another, or for the discussion of public questions. The First Amendment has never been held to inhibit action by individuals in respect to their property. *Watchtower Bible & Tract Society v. Metropolitan Life Insurance Company*,

279 N. Y. 339, 79 N. E. (2d) 433; *Commonwealth v. Richardson*, 313 Mass. 632, 48 N. E. (2d) 678. The petitioners in this case had the right to express their opinions on the streets. They had the privilege to enter the Kress store in Greenville. But, when they refused to leave on being requested to do so, they no longer had a right to give vent to their thoughts on the premises of the Kress store. They cannot complaint of their conviction for trespass where they insisted on remaining in a place they had no right to be. They cannot be permitted to arm themselves with an acceptable principle, such as freedom of speech, and proceed to use it as an iron standard to smooth their path by crushing the rights of others to the possession of their property. *Breard v. Alexandria*, 341 U. S. 622.

The petitioners cite a number of labor relations and particularly picketing cases. Undoubtedly peaceful picketing may be carried out on the public streets and sidewalks. Picketers have the right to publicize their dispute under the First Amendment. What is protected in picketing is the liberty to discuss publicly and truthfully all matters of public concern. *Thornhill v. Alabama*, 310 U. S. 88. The important thing about picketing is that it is used to inform members of the public of the existing state of affairs. Its purpose is not to inform the employer; assumedly he knows of the dispute, and at least one side of the argument. In the instant case the petitioners were not attempting to pass on information to the public. They were attempting by demonstration and coercion to force a private person to make a use of his property not in accord with his desires. Here there was no gentle persuasion. Nor was the S. H. Kress & Company the proper object of their instruction. A private person cannot be forced, on his own property, to listen to the arguments of anyone, whether he agrees with the sentiments expressed or not. *Martin v. Struthers*, *supra*. Even the listener on the street can turn away. A

listener on his own land should not be required to retreat, he should be able to require the speaker to turn away, and prosecute him for trespass if he does not.

Peaceful picketing, even when conducted on the streets, is not absolutely protected by the First Amendment. Picketing cannot be used in connection with a conspiracy to restrain trade, to prevent union drivers from crossing picket lines. *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490. Nor is picketing lawful where it interferes with the free ingress and egress of customers into a place of business. *Teamsters Union v. Hanke*, 339 U. S. 470. The conduct of the petitioners in this case, if it can be analogized to picketing, was unlawful. They sought not to appeal to the reason of the public. They sought rather to obstruct the business of S. H. Kress & Company by squatting on its property and refusing to move. They sought to prevent its doing business with others unless it did business with them, by taking steps to effectively prevent the entrance of others. Their conduct clearly exceeded the bounds of freedom of speech and of peaceful picketing. They were properly arrested and convicted of trespassing.

B. The petitioners were not denied freedom of speech in being convicted under a trespass statute which does not expressly require proof that the person ordering them to leave establish his authority at the time of making the request.

The petitioners moved in the trial court for dismissal of the warrants on the ground they were indefinite and uncertain. The facts of the case show otherwise. They were arrested in the act of committing the offense charged, they refused the manager's request to leave after the lunch counter had been closed and the lights extinguished. There could have been no doubt in their minds as to what they were charged with. Warrants drawn such as the ones in the in-

stant case have been passed on before and held sufficient. In *State v. Hallback*, 40 S. C. 28, 18 S. E. 919, the warrant was held sufficiently certain which alleged "that Jerry Hallback did commit a trespass after notice." Of like effect is *State v. Tenney*, 58 S. C. 215, 36 S. E. 555. The petitioners' attorneys realized they were being charged with trespass. (R. 2.) And from the warrant they had a citation to the law, with particulars as to the date, time and place of the arrest. And it is noteworthy of comment that the petitioners did not make a motion to make the charge more definite and certain, which they had a right to do.

The petitioners claim that the statute is unconstitutional because it does not expressly require the landowner or person in possession to identify himself. The statute necessarily means that the person forbidding a person to remain in the premises of another shall be the person in possession, or his agent or representative, and that is an essential element of the offense to be proved by the State beyond a reasonable doubt. The manager of the store testified positively that he was the manager and that he requested the petitioners to leave. (R. 19.) The only one of the petitioners to testify at the trial knew Mr. West was the manager as she had spoken to him over the telephone before (R. 43), and she recognized him at the store at the time of the demonstration (R. 42, 47).

If the person ordering them out had no such authority, that would be a defense, to be proved in Court. But here the evidence supports the inference that the petitioners knew that the person who ordered them to leave had authority to do so. They did not question his authority. They did not so much as ask his name, so they could later investigate the extent of his authority. The petitioners knew they were not authorized and they could presume that anyone who undertook to exercise control over the premises was lawfully in control.

The cases cited by petitioners are not relevant here at all. They require **scienter** in cases involving matters of opinion based on value judgments. The authority of the person ordering them to leave the S. H. Kress Company store does not involve such a judgment. It cannot be contended that petitioners should be entitled to spar with the person in possession requiring proof of authority to their satisfaction. Could they require a landowner to produce his deed, or a lessee his lease? Can they argue with him over the extent of his implied authority and all the nice technicalities of the law of agency? We submit that the authority of the person in possession is apparent from his direction to another to leave the premises, that he cannot be required to prove his authority to the satisfaction of the trespasser there or anywhere, except in a court when he is tried for the trespass. The petitioners never questioned the authority of the manager and his authority having been proved in court beyond a reasonable doubt, they should not now be heard to complain.

CONCLUSION

For the foregoing reasons the respondent submits that Section 16-388 of the Code of Laws of South Carolina, 1952, as applied to the petitioners, presents no question whatever in conflict with the Fourteenth and First Amendments to the Constitution of the United States, or the decisions of this Court, and that the petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

THOMAS A. WOFFORD,
THEODORE A. SNYDER, JR.,
200 Masonic Temple,
Greenville, South Carolina,

W. H. ARNOLD,
City Attorney,
Lawyers Building,
Greenville, South Carolina,

H. F. PARTEE,
Assistant City Attorney,
Greenville, South Carolina,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 71

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELAN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT, and ROSE MARIE COLLINS,

Petitioners,

—v.—

CITY OF GREENVILLE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PETITIONERS

JACK GREENBERG
CONSTANCE BAKER MOTLEY
JAMES M. NABRIT, III
MICHAEL MELTSNER
10 Columbus Circle
New York 19, N. Y.

MATTHEW J. PERRY
LINCOLN C. JENKINS, JR.
Columbia, South Carolina

WILLIE T. SMITH
Greenville, South Carolina

Attorneys for Petitioners

LEROY CLARK
WILLIAM T. COLEMAN, JR.
WILLIAM R. MING, JR.
LOUIS H. POLLAK
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1962

No. 71

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELAN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT, and ROSE MARIE COLLINS,

Petitioners,

—v.—

CITY OF GREENVILLE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Supreme Court of South Carolina (R. 55) is reported at 122 S. E. 2d 826 (1961). The opinion of the Greenville County Court is unreported but is set forth in the printed record (R. 50).

Jurisdiction

The judgment of the Supreme Court of South Carolina was entered November 10, 1961 and petition for rehearing denied on November 30, 1961. The petition for certiorari

was filed on February 26, 1962 and granted by this court on June 25, 1962.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257 (3), petitioners having asserted below, and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 16-388, Code of Laws of South Carolina, 1952, as amended 1960:

Any person:

(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or

(2) who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,

Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

3. This case involves Section 31-8, Code of Greenville, 1953 as amended by 1958 Cumulative Supplement.

It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house,

boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:

a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;

b) Separate tables, counters or booths;

c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;

d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;

e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races.

Questions Presented

Petitioners have been arrested, convicted, and sentenced for refusal to obey an order to leave the lunch counter in a store open to the public, including Negroes. This order was given to enforce a City Ordinance and a community custom generated by a massive body of state segregation law. The premises are extensively licensed and regulated by the State. South Carolina has failed to accord Negroes the right of equal access to public accommodations.

I.

A. Whether a State may arrest and convict petitioners of trespass where a City Ordinance required the policy of excluding Negroes to be enforced?

B. May South Carolina, compatibly with the Fourteenth Amendment, make petitioners the target of a prosecution under its trespass laws when the rationale of the prosecution is to enforce a claimed legal right of racial discrimination of the S. H. Kress Corporation?

C. Are not these criminal trespass prosecutions, in any event, incompatible with the Fourteenth Amendment because they constitute purposeful state enforcement of a custom of racial discrimination—a custom which is itself the carefully nurtured fruit of decades of segregation required by state law?

D. Is not the degree of supervision and control which the State of South Carolina exercises over the S. H. Kress lunch counter business so extensive a form of state involvement that, given the circumstances of A, B and C, *supra*, South Carolina has failed in its obligation to afford equal protection of the laws?

E. In addition to considerations set forth above, is not the property right which S. H. Kress and Co. has asserted —the right to discriminate racially in a single portion of a store open to the general public—so inconsequential to the main core of its proprietary interest, that the State may not compatibly with the Fourteenth Amendment, enforce that right by its criminal laws?

F. In view of the fact that South Carolina denies protection to Negroes against racial discrimination in public accommodations, do not the circumstances set forth above establish a denial of equal protection of the laws?

II.

A. Is not South Carolina denying petitioners freedom of speech secured by the Fourteenth Amendment by using its criminal trespass laws as a device to stop petitioners from urging S. H. Kress and Company to abandon its discrimination practices?

B. Is not freedom of speech impaired by failure to construe the statute under which conviction was obtained to require notice that the request to leave the premises was given by one who had established authority to issue such request at the time given?

Statement

Petitioners, ten Negro students, were arrested for participating in a sit-in demonstration at the lunch counter of the S. H. Kress and Company department store on August 9, 1960 (R. 8), in Greenville, South Carolina, a city which by ordinance requires segregation in eating facilities (R. 11), were convicted of trespass in violation of Section 16-388, Code of Laws of South Carolina, 1952, as amended 1960, and sentenced to pay a fine of one hundred dollars ($100.00) or serve thirty (30) days in jail (R. 47).

At about 11:00 a.m. on August 9, 1960, petitioners entered the Kress department store and seated themselves at the lunch counter (R. 36). The store services Negroes in all departments except the lunch counter which is reserved for whites (R. 14, 22). Petitioners requested service and were told, "I am sorry, we do not serve Negroes." White persons were seated at the counter and were being served at the time. The manager of the store, Mr. West, upon noting that petitioners had seated themselves at the white lunch counter, approached them and requested,

"everybody to leave, that the lunch counter was closed" (R. 19). He said his purpose in closing the counter at a time when it ordinarily would be operated was to prevent Negroes from using a lunch counter reserved for whites. Mr. West was aware that the petitioners were participating in a demonstration to secure service at the lunch counter on an equal basis, as previous sit-in demonstrations had been staged there by some of the petitioners. Further, petitioner Doris Wright had been in communication with him to request service for Negroes, and during these communications she was told of the near success of the demonstrations and received a promise that no charges would be pressed if the protests against segregated luncheon facilities were continued (R. 38-39). Mr. West, in fact, did not request the arrest of petitioners, nor did he sign the complaint against them (R. 5, 16-17).

Also, at about 11:00 a.m. Captain Bramlette of the Greenville Police Department received a call that some colored boys and girls were at the lunch counter. He knew that the City of Greenville had an ordinance prohibiting colored and white persons from being served at the same eating facilities (R. 10-11). He proceeded to the store, entered with several policemen, and found two agents of the South Carolina Law Enforcement Department already present at the lunch counter (R. 7). He noticed the ten petitioners seated at the counter which could accommodate almost fifty-nine persons (R. 7, 25). Although Mr. West made no request of the officers to remove the petitioners, Captain Bramlette arrested them a few minutes after the announcement was made that the counter was closed (R. 8).[1] The petitioners, according to the testimony of the arresting officer and the

[1] Four other Negro demonstrators were arrested, but their cases were disposed of by the juvenile authorities (R. 7).

manager, were clean, neatly dressed, orderly, and used no profanity (R. 12-13, 24).

A witness for the defense, Mr. Raymond Carter, who was standing nearby during the demonstration, testified that at the time Mr. West announced the closing of the counter, the whites who were sitting remained seated but were not arrested (R. 30). (This testimony was disputed by Mr. West, who claimed that the whites who were sitting at the counter removed themselves upon his announcement (R. 19).) Mr. Raymond Carter gave further testimony, supported by Mr. West, that after petitioners were arrested and escorted from the premises, counter service to whites promptly was resumed (R. 23, 31).

Mr. West testified that he instructed one of the store's employees to call the police; but when petitioners' counsel attempted to ascertain whether there was any pre-arrangement or agreement between the store and the police to secure the arrest of the demonstrators, the court denied permission to proceed (R. 22-23). Mr. West stated that he closed the lunch counter because of a Greenville city ordinance requiring racial segregation in eating facilities and local custom:

> Q. Mr. West, why did you order your lunch counter closed? A. It's contrary to local custom and it's also the ordinance that has been discussed (R. 23).

On cross examination, Captain Bramlette, the arresting officer, evidenced confusion as to whether defendants were arrested because they violated Greenville's ordinance requiring segregation in eating facilities or the State of South Carolina's trespass statute:

> Q. Did the manager of Kress', did he ask you to place these defendants under arrest, Captain Bramlette? A. He did not.

Q. He did not? A. No.

Q. Then why did you place them under arrest? A. Because we have an ordinance against it.

Q. An ordinance? A. That's right.

Q. But you just now testified that you did not have the ordinance in mind when you went over there? A. State law in mind when I went up there.

Q. And that isn't the Ordinance of the City of Greenville, is it? A. This supersedes the order for the City of Greenville.

Q. In other words, you believe you referred to an ordinance, but I believe you had the State statute in mind? A. You asked me have I, did I have knowledge of the City Ordinance in mind when I went up there and I answered I did not have it particularly in my mind, I said I had the State Ordinance in my mind.

Q. I see and so far this City Ordinance which requires segregation of the races in restaurants, you at no time had it in mind, as you went about answering the call to Kress' and placing these people under arrest? A. In my opinion the state law was passed recently supersedes our City Ordinance (R. 16-17).

This "State law" is the trespass statute petitioners were charged with violating. Previously, Captain Bramlette had testified that he thought the State's trespass statute expressly mentioned "sit-ins" (R. 15).

Kress and Company is a large nationwide chain which operates junior department stores (R. 20). The Greenville branch has fifteen to twenty departments, sells over 10,000 items, and is open to the general public (R. 21). Negroes and whites are invited to purchase and are served alike with the exception that Negroes are not served at the lunch counter which is reserved for whites (R. 14, 22). Kress'

national policy is "to follow local customs" with regard to serving Negroes and whites at its lunch counters (R. 21).

Petitioners were tried and convicted in the Recorder's Court of Greenville before the City Recorder, sitting without a jury, and sentenced to pay a fine of one hundred dollars ($100.00) or serve thirty (30) days in the city jail (R. 2).

Petitioners appealed the judgment of Recorder's Court to the Greenville County Court, which dismissed the appeal on March 17, 1961 (R. 2).

The Supreme Court of South Carolina entered its judgment, affirming the judgment and sentences below on November 10, 1961, and denied rehearing on November 30, 1961 (R. 59, 62).

Summary of Argument

I.

Despite a City Ordinance requiring segregation in eating facilities which compelled the store manager to refuse service to Negro petitioners, the Supreme Court of South Carolina held it was only neutrally enforcing the property right of the owner of a department store. But segregation enforced by legislation violates the rights of petitioners to the equal protection of the laws. Secondly, while in some circumstances there may be a personal privilege to make racial distinctions it cannot apply when segregation is required by law and, moreover, its limit is reached when the person exercising it turns to the State for assistance. Judicial and police action are no less forbidden State action when invoked to enforce discrimination initiated by an individual. Any suggestion that private rights, in the sense that they invoke considerations of privacy, are in-

volved is farfetched. Kress's has been open to the public in general. The management did not assert the corporation's own preference for a segregation policy, but rather, as stated explicitly in the record, the policy of a City Ordinance and the custom of the community. While considerations of privacy are meaningful in determining the reach of some constitutional liberties, the right in this case, to freedom from State imposed racial discrimination is not in competition with any interest the State might have in protecting privacy.

At the very least, however, the State may not enforce racial discrimination which expresses deep-rooted public policy. The record here conclusively shows that this is what happened in this case. Such customs are a form of State action. But beyond this, the segregation customs in this case were generated by a host of State segregation laws including a City Ordinance compelling segregation in eating facilities. Scholarship establishes the crucial role which government, politics, and law have played in creating segregation customs.

But the State-enforced, State-created community custom of segregation in this case is even more vicious because it has taken place in an establishment in which the State has been deeply involved by requiring extensive licensing and regulation. State involvement in such an enterprise precludes State enforcement of segregation therein by means of arrests and prosecutions for trespass.

The holding below that the State merely was in a neutral fashion enforcing a property right does not decide this case. States can and have constitutionally forbidden property owners to discriminate on the basis of race in public accommodations. South Carolina has not inhibited itself from requiring racial segregation on private property. The

more an owner for his advantage opens his property for use by the public in general, the more do his rights become circumscribed by the constitutional and statutory rights of those who use it.

Property is a bundle of rights and privileges granted by the State. That portion of the rights which constitute Kress's property, which Kress asserts here, and which the State has enforced is to control the conduct and association of others. This type of property right historically has never been unrestrained throughout the whole range of efforts to assert it. Restraints on that power are but a manifestation of the fact that law regularly limits or shapes property rights where they may have harmful public consequences. Other characteristics of the asserted right to racially discriminate in this case are that no claim of privacy has been intruded upon; that petitioners sought only to use the premises for their intended function; that segregation was required only in a single part of an establishment open to the general public, to which petitioners were admitted, and in which they were invited to trade freely except at the lunch counter in question. This sliver in the entire complex of powers and privileges which constitutes Kress's property is hardly entitled to legal protection when it collides with the Equal Protection Clause of the Fourteenth Amendment, whose purpose was an end of discrimination against the Negro.

Moreover, the *Civil Rights Cases* assumed the States provided "a right to enjoy equal accommodations and privileges . . . one of the essential rights of the citizen which no state can interfere with." The failure to provide such rights can deny the equal protection of the laws. One member of the Court which decided the *Civil Rights Cases* previously had written that denial included omission to protect

as well as the omission to pass laws for protection. Legislators concerned with the scope of the Fourteenth Amendment expressed similar views. The *Civil Rights Cases* were decided on the assumption that the States in question protected those rights. It is doubtful that the result would have been the same if then, as today in South Carolina, the States actively interfered with the right of equal access to public facilities. No State may abdicate its responsibilities by ignoring them; and where a State by its inaction has made itself a party to the refusal of service and has placed its power and prestige behind discrimination, convictions such as those obtained in this case must fall.

II.

The convictions violate petitioners' rights to freedom of speech and expression as secured by the due process clause of the Fourteenth Amendment against state infringement. Petitioners' action here, a sit-in, is a well recognized form of protest and was entirely appropriate to the circumstances, including the use to which the private property involved had been dedicated by the owner. The property owner implicitly consented to the expression and did not seek the intervention of the criminal process. There were no speeches, picket signs, handbills, or other forms of expression which might possibly be inappropriate to the time and place. There was merely a request to be permitted to purchase goods in the place provided for such purchases. The expression was not in such circumstances or of such a nature as to create a clear and present danger of any substantive evil the State had a right to prevent. The arrests improperly stifled a protest against racial discrimination.

The statute applied to convict petitioners was unreasonably vague and thereby offends the due process clause of

the Fourteenth Amendment. The statute was construed by the Court below to uphold convictions obtained without proof that petitioners were requested to leave by a person who had established authority to issue such request at the time given. If in the circumstances of this case freedom of speech and expression are to be curtailed, petitioners have a right to expect reasonable notice of such a rule in the statute under which the convictions were obtained.

ARGUMENT

I.

South Carolina in Enforcing Racial Discrimination Has Denied to Petitioners the Equal Protection of the Laws Secured by the Fourteenth Amendment.

A. Petitioners' Exclusion From the Lunch Counter, and Their Arrest and Conviction, Was Required by an Ordinance of the City of Greenville Which Compels Segregation in Eating Facilities in Violation of Petitioners' Rights to the Equal Protection of the Laws as Secured by the Fourteenth Amendment.

Although petitioners were formally charged and convicted of trespass, in actuality the "trespass" consisted solely of violating the City of Greenville's affirmative requirement of racial segregation. This legal requirement of segregation is expressed in Section 31-8, Code of Greenville, 1953, as amended 1958 Cumulative Supplement, see *supra* pp. 2-3, making it unlawful "to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter" unless "separate eating utensils . . . dishes . . . tables, counters or booths" are provided and "a distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served" (R. 49).

In short, the City of Greenville determined that petitioners' conduct would be unlawful even if the department store had consented to serve them at the lunch counter.

G. W. West, the Manager of the department store, testified explicitly that exclusion of Negroes from the lunch counter, and the closing of the counter when petitioners sought service, was necessary because of the City Ordinance requiring segregation in eating facilities (R. 23).[2] Captain Bramlette, the arresting officer, was unclear as to the distinction between the City Ordinance requiring segregation and the State trespass statute (R. 15-17).

On this record, it is clear that Kress and Company would have been willing to cope with the controversy within the realm of social and economic give and take absent the Ordinance of the City of Greenville requiring segregation and the force of local customs supported by the City and the State of South Carolina, see *infra* pp. 22-28.

Prior to this demonstration, petitioners had been told by Store Manager West that he would not press charges if petitioners attempted to sit-in at the lunch counter (R. 38). Although a store employee called the police (R. 22), petitioners were not permitted at the trial, to ascertain if this was due to prearrangement (R. 22, 23). West did not request the arrest of petitioners, nor did he sign the complaint against them (R. 5, 16, 17).

If, as the manager testified, S. H. Kress & Company maintained the policy of segregation because of the Ordinance then there can be no other conclusion than that the City, by the Ordinance and by arrest and criminal convic-

[2] Mr. West testified at R. 23:

"Q. Mr. West, why did you order your lunch counter closed? A. It's contrary to local customs and it's also the ordinance that has been discussed."

tion, has "place[d] its authority behind discriminatory treatment based solely on color . . ." Mr. Justice Frankfurter, dissenting in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727. The City Ordinance is no abstract exhortation but obligatory by its terms, to which were attached criminal sanctions, and it is uncontradicted that S. H. Kress & Company chose a policy of racial segregation because of the Ordinance.

Petitioners' arrest and conviction result, therefore, directly from the formally enacted segregation command of the City of Greenville, South Carolina, and not (so far as this record indicates) from any individual or corporate business decision or preference of the management of the store to exclude Negroes from the lunch counter. Whatever the choice of the property owner may have been, here the City made the choice to exclude petitioners from the property through its segregation Ordinance. This City segregation policy was enforced by petitioners' arrests, convictions and sentences in the South Carolina courts.

The Supreme Court of South Carolina dismisses reference to the City segregation Ordinance by stating "The Ordinance was made a part of the record upon request of defendants' counsel but defendants were not charged with having violated any of its provisions" (R. 59). But, the Constitution forbids "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275.[3] In fact, the very existence of the Ordinance placed the "power" and "prestige" of the State behind

[3] Racial segregation imposed under another name often has been condemned by this Court. *Guinn* v. *U. S.*, 238 U. S. 347; *Lane* v. *Wilson*, *supra*; *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala. 1949), aff'd 336 U. S. 933; and see *Louisiana State University and A. & M. College* v. *Ludley*, 252 F. 2d (5th Cir. 1958), cert. denied 358 U. S. 819.

racial discrimination. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725.

By enacting first, that persons who remain in a restaurant when the owner demands that they leave are "trespassers," and then enacting that restaurants may not permit Negroes to remain in white restaurants, South Carolina has very clearly made it a crime (a trespass) for a Negro to remain in a white restaurant. The manager of Kress's admits as much when he testified that the lunch counters were closed and petitioners asked to leave because of the Ordinance (R. 23).

This case thus presents a plain conflict with numerous prior decisions of this Court invalidating state efforts to require or authorize racial segregation. *Buchanan* v. *Warley*, 245 U. S. 60; *Brown* v. *Board of Education*, 347 U. S. 483; *Gayle* v. *Browder*, 352 U. S. 903, aff'g 142 F. Supp. 707, 712 (M. D. Ala. 1956); *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877; *State Athletic Commission* v. *Dorsey*, 359 U. S. 533; cf. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727. Note the dissenting opinion of Judges Bazelon and Edgerton in *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 843 (D. C. Cir. 1961) (dealing primarily with the related issue of whether a proprietor excluding a Negro under an erroneous belief that this was required by state statute was liable for damages under the Civil Rights Act; the majority applied the equitable abstention doctrine). Indeed, *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 (4th Cir. 1959) relied upon by the Supreme Court of South Carolina below, indicated that racial segregation in a restaurant "in obedience to some positive provision of State law" would be a violation of the Fourteenth Amendment. See also *Boman* v. *Birmingham Transit Com-*

pany, 280 F. 2d 531 (5th Cir. 1960); *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961).

B. Arrest, Conviction, and Sentence to Prison for Trespass for Having Violated the S. H. Kress Co.'s Requirement of Racial Segregation at Its Public Lunch Counter Deny Petitioners the Equal Protection of the Laws Secured by the Fourteenth Amendment.

In affirming the conviction below the Supreme Court of South Carolina held it was enforcing the right of a proprietor to select the clientele he will serve on "purely personal grounds" (R. 58). While in some circumstances there may be a personal privilege of making racial distinctions, the limit of that privilege certainly is reached when the person exercising it turns to state instrumentalities for assistance. There is no clear legal right of racial discrimination. *Shelley* v. *Kraemer*, 334 U. S. 1. Racial discrimination is constitutionally inadmissible when "the state in any of its manifestations has been found to have become involved in it." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.[4]

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[4] Segregation has been forbidden in schools, *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1; parks and recreational facilities, *Mayor etc. of Baltimore* v. *Dawson*, 350 U. S. 877; *Holmes* v. *Atlanta*, 350 U. S. 879; *New Orleans City Park Improvement Ass'n* v. *Detiege*, 358 U. S. 54; and airports, *Turner* v. *Memphis*, 369 U. S. 350; *Henry* v. *Greenville Airport Comm'n*, 284 F. 2d 631 (4th Cir. 1960).

Segregation requirements have been prohibited in privately sponsored athletic contests, *State Athletic Comm'n* v. *Dorsey*, 359 U. S. 533; and in connection with privately owned transportation facilities, *Gayle* v. *Browder*, 352 U. S. 903; *Evers* v. *Dwyer*, 358 U. S. 202; *Bailey* v. *Patterson*, 369 U. S. 31; *Taylor* v. *Louisiana*, 370 U. S. 154; *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960). A State law construed to authorize discrimination by privately owned restaurants was thought to be "clearly violative of the Fourteenth Amendment" by Mr. Justice Stewart, concurring in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727. Three dissenting Justices agreed this would follow if that were a proper

"[I]t has never been suggested that state court action is immunized from the operation of [the Fourteenth Amendment] . . . simply because the act is that of the judicial branch of the state government." *Shelley* v. *Kraemer*, 334 U. S. at 18. See also *Barrows* v. *Jackson*, 346 U. S. 249; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 499, 463. Police action which segregates denies Fourteenth Amendment rights. *Taylor* v. *Louisiana*, 370 U. S. 154; *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533, note 1 (5th Cir. 1960); see also *Monroe* v. *Pape*, 365 U. S. 167; *Screws* v. *United States*, 325 U. S. 91. "Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a prior agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms." *Shelley* v. *Kraemer*, 334 U. S. at 20; see also *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

In the *Civil Rights Cases*, 109 U. S. 3, 17, this Court held outside the Amendment's scope individual action "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings" or "not sanctioned in some way by the State" 109 U. S. at 17. The opinion referred to "State action of every kind" inconsistent with equal pro-

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construction of the law, 365 U. S. 715, 727, 729. State laws requiring segregation in the use and occupancy of privately owned property were invalidated in *Buchanan* v. *Warley*, 245 U. S. 60; and *Harmon* v. *Tyler*, 273 U. S. 668.

Among the numerous cases forbidding segregation in publicly owned but privately leased facilities, see *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Turner* v. *Memphis*, 369 U. S. 350; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971, vacating and remanding, 202 F. 2d 275; *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956), cert. den. *sub nom. Casey* v. *Plummer*, 353 U. S. 924.

tection of the laws, *id.* at p. 11; to "the operation of State laws, and the action of State officers executive or judicial," *id.* at p. 11. Repeatedly, the opinion held within the scope of the Fourteenth Amendment "state laws of state proceedings," *id.* at 11; "some State action," *id.* at 13; "acts done under State authority," *id.* at 13; "State action of some kind," *id.* at 13; and the opinion pointed out that "States are forbidden to legislate or act in a particular way," *id.* at 15. The Fourteenth Amendment is "addressed to counteract and afford relief against state regulations or proceedings," *id.* at 23.

Racial discriminations "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100. Certainly in this case the State is more deeply implicated in enforcing that racism so odious to our Constitution than it was in *Shelley* v. *Kraemer*. For here, the State has not merely held its courts open to suitors who would seek their aid in enforcing discrimination, but has taken the initiative in arresting and prosecuting petitioners criminally and sentencing them to fines or prison terms.

Moreover, petitioners here assert not merely the generalized constitutional right found in the equal protection clause of the Fourteenth Amendment to be free from racial discrimination. 42 U. S. C. 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U. S. C. 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to * * * purchase * * * real and personal property." Referring to similar statutory provisions in-

volving jury service, this Court has declared: "For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination." *Fay* v. *New York*, 332 U. S. 261, 282-283.

The opinion below stresses that Kress's is "a privately owned business" (R. 58). But "private" is a word of several possible meanings. To the extent that concepts of privacy play a part in defining rights here at issue, Kress's privacy should be seen as it really is. Any suggestion that some exception to the *Shelley* rule should be made for a corporation which has sought state aid in enforcing racial discrimination in its enterprise open to the general public for profit, because somehow the inviolability of a private home may be impaired, is without merit. This prosecution is not asserted to be in aid of any interest in privacy of the property owner, for it has opened the store to the public in general. And the lunch counter was not closed after petitioners were seated in order to exert any claim of privacy but to conform with local law (R. 23). As soon as petitioners were arrested by the police and removed, the lunch counter was reopened (R. 23). For this reason, the suggestion of the Supreme Court of South Carolina that a business is "not devoted to public use" once an individual's "implied license to enter" is revoked is not sound (R. 58, 59). Moreover, the proprietor here has not expressed *its* preference, rather it has sought state aid to enforce the custom of the community. Were a state to enforce a trespass law to protect a real interest in some private aspect of property a different result might be required because of the importance of the right of privacy which finds firm support in the decisions of this Court. Examples where such countervailing considerations have applied are cases such as

Breard v. *Alexandria*, 341 U. S. 622, 626, 644, and *Kovacs* v. *Cooper*, 336 U. S. 77. On the other hand a case such as *Martin* v. *Struthers*, 319 U. S. 141, is an instance where even considerations of privacy did not overcome a competing constitutional right like freedom of religion.[5] In this case, the right to freedom from state imposed racial discrimination does not compete with any interest the state may have in protecting privacy.[6]

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[5] And see *Watchtower Bible and Tract Soc.* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433 (1948) in which the New York courts distinguished between the right to solicit in the streets of a large scale housing project and to go, without invitation, into the hallways to visit private apartments.

[6] To weigh considerations of privacy in a case involving racial discrimination would comport with the views of the framers of the Fourteenth Amendment. During the debate on the bill introduced in the Senate by Charles Sumner of Massachusetts on December 20, 1871, to amend the *Civil Rights Act* of 1866, 14 Stat. 27, which served as the precursor to the *Civil Rights Act* of 1875, 18 Stat. 336, Senator Sumner distinguished between a man's home and places and facilities of public accommodation licensed by law: "Each person, whether Senator or citizen, is always free to choose who shall be his friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; * * * but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of *Equality;* nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own. But nobody pretends that Equality on the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say that *Equality in all institutions created or regulated by law* is as little a question of society" (emphasis added). After quoting Holingshead, Story, Kent, and Parsons on the common law duties of innkeepers and common carriers to treat all alike, Sumner then said: "As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so must it be with the theater and other places of public amsuement. Here are institutions whose peculiar object is the 'pursuit of happiness,' which has been placed among the equal rights of all." Cong. Globe, 42d Cong., 2d Sess., 382-383 (1873).

It is not unreasonable that considerations of privacy should weigh so heavily. The right of privacy against intrusion on one's premises

C. Certainly, at Least, the State May Not by Its Police and Courts Enforce Such Segregation When It Stems From a Community Custom of Segregation Which Has Been Generated by State Law.

Certainly, at the very least, the well established rule—that states may not enforce racial discrimination—discussed in part B, applies where the racial segregation is not a matter of private choice, but expresses deep-rooted public policy.

That segregation was the custom of the community is stated expressly on the record, although one hardly need turn there to learn a fact concerning conditions in society so well known. *Child Labor Tax Case*, 259 U. S. 20, 37. Kress's manager, however, made clear that the store's segregation policy was merely that of community law and custom (R. 23).

> Q. Mr. West, why did you order your lunch counter closed? A. It's contrary to local customs and it's also the ordinance that has been discussed.
>
> Q. As I understand then further, that you are saying that the presence of Negroes at your lunch counter was contrary to customs? A. Yes, sir.

The *Civil Rights Cases* speak of "customs having the force of law," 109 U. S. 3, 16, as a form of state action.[7]

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or into one's personal affairs. 4 Blackstone's Commentaries Ch. 13, §5(6) (Wendell's Ed. 1850), was recognized at common law, and is recognized generally in American law. See A. L. I., Restatement of Torts, §867 (1939). This Court has recently reiterated that the due process clause protects privacy against intrusion by the States. *Mapp* v. *Ohio*, 367 U. S. 643, 654, 655; *Wolf* v. *Colorado*, 338 U. S. 25, 27-28. Cf. *Gilbert* v. *Minnesota*, 254 U. S. 325, 336 (Justice Brandeis dissenting); *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 464, 468.

[7] See also 109 U. S. at 21 "long custom, which had the force of law."

Here, as in *Garner* v. *Louisiana*, 368 U. S. 157, "[s]egregation is basic to the structure of . . . [the state] as a community; the custom that maintains it is at least powerful as any law." (Mr. Justice Douglas concurring at 181.)[8]

Custom in South Carolina is not separate from law. As indicated by the Greenville segregation ordinance, custom and law are interdependent. Custom has roots in and fills the interstices of a complex network of state mandated segregation. State and city imposed requirements govern not only activities furnished by the state but privately-owned facilities as well. The subordinate role to which the segregation laws relegate Negroes is well illustrated by §40-452, South Carolina Code of Laws, 1952, making it unlawful for white and colored employees in textile factories to (a) work together in the same room, (b) use same entrance or exit, (c) use and occupy same pay windows, (d) use same stairway or window at the same time, and (e) use at any time same lavatories, toilets, drinking water, buckets, pails, cups, dippers or glasses.

In South Carolina "Schools are segregated from grammar school up through college. Pupils are assigned to their respective schools by race."[9] State appropriations are inoperative for schools from or to which students transfer as a result of court order.[10]

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[8] This Court has recognized that "'Deeply embedded traditional ways of carrying out state policy . . .'—or not carrying it out—'are often tougher and truer law than the dead words of the written text.' *Nashville C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 369"; *Poe* v. *Ullman*, 367 U. S. 497, 502.

[9] Report of the South Carolina State Advisory Committee to the United States Commission on Civil Rights, "The 50 States Report" p. 564 (1961). S. C. Const. art. 11 §7 compels racial segregation in schools.

[10] South Carolina Code of Laws §21-2 (1957 Supp.). See also S. C. A. & J. R. 1952 (47) 2223, A. & J. R. 1954 (48) 1695 repealing

State law requires segregation at circuses and travelling shows;[11] in prisons and chain gangs;[12] on steam ferries and in railroad cars;[13] in station restaurants or eating places;[14] on street cars where Negroes are to be seated in the rear[15] and when standing are to be kept as far from whites as practicable;[16] Negroes and whites must separate on interurban cars[17] or may be sentenced to work on the county chain gang.[18] It is a crime in South Carolina to give a colored person custody of a white child.[19] Marriage of one of African descent to one who is not of African descent is prohibited.[20] Such a marriage is void and subjects the parties to criminal penalties.[21] The South Carolina park system is segregated by statute.[22] When a statute prohibiting joint use of parks in cities of over 60,000 in population was declared unconstitutional in *Clark* v. *Flory*,

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S. C. Const. art. 11 §5 (1895) which required legislature to maintain free public schools; S. C. Code §§*21-761 to -779* (regular school attendance) repealed by A. & J. R. 1955 (49) 85; §21-238 (1957 Supp.) (school officials may sell or lease school property whenever they deem it expedient); §21-230(7) (local trustees may or may not operate schools).

[11] S. C. Code §5-19 (1952).

[12] S. C. Code §55-1 (1952).

[13] S. C. Code §§58-714, 715, 718-720 (1952).

[14] S. C. Code §58-551 (1952).

[15] S. C. Code §58-1331 (1952).

[16] S. C. Code §58-1332 (1952).

[17] S. C. Code §58-1334 (1952).

[18] S. C. Code §§58-1337, 1338 (1952).

[19] S. C. Code §16-553 (1952).

[20] S. C. Const. art. 3 §33.

[21] S. C. Code §§20-7 to -8 (1952).

[22] S. C. Code §§51-1, 2.1-2.4 (1957 Supp.).

141 F. Supp. 248 (E. D. S. C. 1956),[23] a new statute immediately closed the park in question.[24] Public libraries are, with two exceptions, segregated and in some localities "Negroes who enter publicly supported libraries that are reserved for whites are subject to a fine . . . [or] . . . imprisonment."[25] The extent and persistence of local segregation cases in South Carolina generally and Greenville, South Carolina, in particular, can be judged from a trial warrant dated April 5, 1962, in which the City charged a Negro with the crime of violating "Sec. 31.10, the Code of City of Greenville S. C. 1953 Be Unlawful for Colored person to occupy Residence in White Block."[26] Cf. *Buchanan* v. *Warley*, 245 U. S. 60 (1914).

C. Vann Woodward has written of the relative recency of the segregation system in America:

> Southerners and other Americans of middle age or even older are contemporaries of Jim Crow. They grew up along with the system. Unable to remember a time when segregation was not the general rule and practice, they have naturally assumed that things have "always been that way." Or if not always, then "since slavery times," or "since The War," or "since reconstruction." Some even think of the system as existing along with slavery. Few have any idea of the relative recency of the Jim Crow laws, or any clear notion of how, when, and why the system arose. Woodward, The Strange Career of Jim Crow, pp. vii-viii (1955).

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[23] S. C. Code §§51-181-84 (1952).

[24] S. C. A. & J. R., 1956, No. 917.

[25] Report of the South Carolina State Advisory Committee to the United States Commission on Civil Rights, "The 50 States Report," p. 566 (1961).

[26] City of Greenville Trial Warrant No. 179, *City* v. *Robinson*.

Even after the end of Reconstruction and during the so-called period of "Redemption" beginning around 1877, the rigid segregation system characteristic of later years had not become the rule. The history of segregation makes clear that during the early years after Reconstruction Negroes were unsegregated in many public eating establishments in the South. *Id.* at 18-24. The Jim Crow or segregation system became all-pervasive some years later as a part of the aggressive racism of the 1890's and early 1900's, including Jim Crow laws passed at that time, which continued until an all-embracing segregation system had become the rule. In this way law shaped custom *id.* at ch. II.

Professor Woodward writes:

> At any rate, the findings of the present investigation tend to bear out the testimony of Negroes from various parts of the South, as reported by the Swedish writer Gunnar Myrdal, to the effect that 'the Jim Crow statutes were effective means of tightening and freezing —in many cases instigating—segregation and discrimination.' The evidence has indicated that under conditions prevailing in the earlier part of the period reviewed the Negro could and did do many things in the South that in the latter part of the period, under different conditions, he was prevented from doing. *Id.* at 90-91.
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>
> It has also been seen that their [Negroes] presence on trains upon equal terms with white men was once regarded as normal, acceptable, and unobjectionable. Whether railways qualify as folkways or stateways, black man and white man once rode them together and without a partition between them. Later on the stateways apparently changed the folkways—or at any rate the railways—for the partitions and Jim Crow cars

> became universal. And the new seating arrangement came to seem as normal, unchangeable, and inevitable as the old ways. And so it was with the soda fountains, eating places, bars, waiting rooms, street cars, and circuses. *Id.* at 91-92.

Thus the system of segregation in places of public accommodations, has from the beginning been a product of government, politics, and law.

This Court has recognized how law may work its effect in ways other than requiring obedience to statutory text. In *Pollock* v. *Williams*, 322 U. S. 4, the Court discharged the petitioner on a writ of habeas corpus because a statutory presumption had induced a plea of guilty:

> The State contends that we must exclude the prima facie evidence provision from consideration because in fact it played no part in producing this conviction. *Id.* at 13.
>
> * * * * *
>
> We cannot doubt that the presumption provision had a coercive effect in producing the plea of guilty. *Id.* at 15.

And see, *Engel* v. *Vitale*, 370 U. S. 421, 430 ("indirect coercive pressure upon religious immunities"). As was said in *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463, "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power . . . that private action takes hold." *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463.[27]

[27] This Court has struck down state action which would enable private individuals to seek reprisals against persons opposed to racial discrimination. *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449. *A fortiori*, the link between state *requirements* of segregation and the conduct it fosters—not merely permits—should be recognized.

Therefore it hardly can be urged that the management was acting privately, unsanctioned by the state. Apart from state support of management's decision to segregate, that decision itself represented the policy of a City ordinance and the policy induced and nourished by the laws of South Carolina. As Mr. Justice Douglas wrote in *Garner v. Louisiana*, 368 U. S. 157, 181, the proprietor's "preference does not make the action 'private' rather than 'state,' action. If it did, a minuscule of private prejudice would convert state into private action. Moreover, where the segregation policy is the policy of a state, it matters not that the agency to enforce it is a private enterprise."

D. *A Fortiori*, the State May Not Arrest and Convict Petitioners for Having Violated a Segregation Policy Which Stems From a State Generated, Community Custom of Segregation in Premises in Which the State Is Deeply Involved Through Its Licensing and Regulatory Powers.

The nature of the State's involvement—demonstrated by extensive regulation and licensing—in the premises where petitioners were arrested for violating the state generated community custom shows even further the invalidity of the judgment below. This discrimination has been enforced in an area of public life with which the State is so intimately involved that Kress's lunch counter business is by law required to be extensively licensed and regulated. The very publicness of the enterprise is demonstrated not only by the fact that Kress serves the general public, but by the interest which the State has demonstrated in that service. In addition to the detailed regulation of business corporations (including foreign corporations)[28] South Carolina

[28] S. C. Code §§12-1 to 12-1083 (1952).

law requires and authorizes various licenses,[29] imposes taxes,[30] and requires state and authorizes local health regulation[31] of this type of business. As Mr. Justice Douglas wrote in *Garner* v. *Louisiana*, 368 U. S. at 183-84:

> A state may not require segregation of the races on conventional public utilities any more than it can segregate them in ordinary public facilities. As stated by the court in Boman v Birmingham Transit Co. (CA 5 Ala) 280 F2d 531, 535, a public utility "is doing something the state deems useful for the public necessity or convenience." It was this idea that the first Mr. Justice Harlan, dissenting in Plessy v Ferguson, . . . advanced. Though a common carrier is private enterprise, "its work" he maintained is public. *Id.* 163 US at

[29] Chain stores are licensed by the state. S. C. Code §§65-1381-1391 (1952). S. C. Code §§25-51, 52 (1952), authorizes towns and cities to regulate, license and inspect restaurants and lunch counters. When city or town ordinances are not complied with, the license may be revoked and the licensee subject to criminal penalties, S. C. Code §§52-53, 54 (1952). Respondents' Opposition to Petition for Writ of Certiorari, p. 5, is, therefore, incorrect when it states: "The only license it [Kress & Company] is dependent upon is the continued good will of the buying public."

[30] South Carolina law requires a license tax, S. C. Code §65-1382 (1952). Retail stores collect a sales tax (Chain Store Tax), S. C. Code §65-1401 (1952) and are required to keep and preserve records of gross receipts. S. C. Code §65-1449 (1952). In addition, South Carolina has a use tax which applies to retailers, S. C. Code §§65-1421-1433 (1952).

[31] State law prescribes comprehensive regulations for places where food is to be served. See Rules and Regulations, S. C. Code, Title 7, pp. 593-596. Restaurants are inspected and graded, *Ibid.* at pp. 593-4; must display the grade received on health inspection, *Ibid.* at p. 593; keep outside doors screened, S. C. Code §35-125 (1952); furnish a clean towel and individual soap (use of roller towels prohibited) S. C. Code §35-126 (1952); clean refrigerators and ventilate kitchens, S. C. Code §35-130 (1952); cover garbage in barrels or galvanized iron cans, S. C. Code §35-133 (1952). Restaurant employees must receive a physical examination before employment, S. C. Code §35-135 (1952). Local regulation is authorized by S. C. Code §§25-51 *et seq.* (1952).

> 554. And there can be no difference, in my view, between one kind of business that is regulated in the public interest and another kind so far as the problem of a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment.

In *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, this Court found sufficient governmental responsibility to require decision of a Fifth Amendment due process claim where the principal governmental involvement was a decision by a regulatory body to do nothing about private activity (radio broadcast on streetcars) it could have prohibited. The lunch counter in this case is also regulated by government, although perhaps not so closely as the streetcar company in *Pollak*. But this case has an element that the *Pollak* case did not, i.e., that government has done so much to encourage racial segregation in public life that it must share responsibility for the discriminatory rule.

And see *Steele* v. *Louisville and Nashville R.R. Co.*, 323 U. S. 192; *Nixon* v. *Condon*, 286 U. S. 73; *Betts* v. *Easley*, 161 Kan. 459, 169 P. 2d 831. In each of these cases, state initiative and licensing in establishing and maintaining the enterprise led to a holding or implication that the Fifth or Fourteenth Amendments forbid racial discrimination.

Here, indeed, is a case where the State "to some significant extent" in many meaningful "manifestations has been found to have become involved . . . . " *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

E. No Essential Property Right of S. H. Kress and Co. Is Here at Issue; the Right to Make Racial Distinctions at a Single Counter in a Store Open to the Public Does Not Outweigh the High Purposes of the Fourteenth Amendment.

The highest court of South Carolina attempted to differentiate this case from others which have refused to sanction state enforcement of racial discrimination by asserting that it was merely neutrally enforcing (R. 57, 58) a "right of those in control of private property" (R. 58) irrespective of color. The court defined the property right as "the liberty to revoke [the implied] license [to enter] at any time" (R. 58).

By failing to analyze the property right in question, however, the court, in effect, assumed that the right of the property owner to racially discriminate was inviolate. States can, of course, prohibit racial discrimination in public eating places without offending any constitutionally protected property rights.[32] And though the laws violate the Fourteenth Amendment, South Carolina and the City of Greenville here imposed the requirement of racial segregation on private property owners.[33] Thus, of course, the asserted property right to treat the races as one desires on his property is very far indeed from an absolute right and has not even been so regarded by South Carolina. "[T]he power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." *Shelley* v. *Kraemer*, 334

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[32] See *Western Turf Ass'n* v. *Greenberg*, 204 U. S. 359; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28. Konvitz & Leskes, *A Century of Civil Rights*, 172-177 (1961).

[33] See pp. 24 to 25, *supra*, citing South Carolina laws requiring segregation on private property and R. 49 setting forth Greenville's segregation in eating facilities ordinance.

U. S. 1, 22, citing *Marsh* v. *Alabama*, 326 U. S. 501. Indeed, the Court said in *Marsh* v. *Alabama*, *supra*, at 506 that constitutional control becomes greater as property is more public in its use:

> The more an owner for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. Republic Aviation Corp. v. Labor Board, 324 U. S. 793, 798, 802, n. 8.

Of course, the Fourteenth Amendment does not forbid a state to assist in the enforcement of property rights as such. Indeed, for an obvious example, the state has an obligation not to engage in or assist in the invasion of the privacy of the home. Considerations of privacy, discussed in more detail, *supra*, pp. 20-21, offer one useful basis for distinguishing between permissible and impermissible types of state action.

Since "property or ownership" is, as Mr. Justice Cardozo has written, a "bundle of privileges" *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582, or as stated elsewhere, "a group or bundle of rights" given by the state, Blodgett, *Comparative Economic Systems* 24 (1944), it matters a great deal which of the rights or privileges constituting Kress's property was enforced in this prosecution. Various characteristics of the property interest demonstrate that this case should not depart from the general rule that states may not support racial discrimination.

The asserted property interest is but a claimed right to control the conduct and associations of others. But this claimed right is clearly separable from other incidents of ownership of the property such as fixing prices, choosing

merchandise for sale, setting hours of business, selling the business or closing it down, to name but a few.

The power to regulate the conduct and associations of others has never been an unrestrained property right. Illustrations include limitations that the law has placed on those who would use their property to control the conduct of donees, as by requiring divorce or separation,[34] or with respect to marriage,[35] restrictions compelling separation of a child from its parents,[36] and requirements controlling certain personal habits.[37]

The power to impose restraints on alienation has been severely limited by courts and legislatures.[38] Restrictive

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[34] Provisions requiring divorce or separation were held void in: *Dwyer* v. *Kuchler*, 116 N. J. Eq. 426, 174 Atl. 154 (Ch. 1934); *In Re Haight's Will*, 51 App. Div. 310, 64 N. Y. S. 1029 (2d Dept. 1900); *Davidson* v. *Wilmington Trust Co.*, 23 Del. Ch. 1, 2 A. 2d 285 (Ch. 1938); *Winterland* v. *Winterland*, 389 Ill. 384, 59 N. E. 2d 661 (1945); *Hawke* v. *Euyhart*, 30 Neb. 149, 46 N. W. 422 (1890); *Cruger* v. *Phelps*, 21 Misc. 252, 47 N. Y. S. 61 (Sup. Ct. 1897).

[35] Certain marriage clauses have been held ineffective—6 Powell, *Real Property* ¶851; A. L. I., *Restatement of Property*, ¶849, n. 1, §424 (1944); *Maddox* v. *Maddox, Adm'r*, 52 Va. 804 (1954).

[36] Restrictions which compel the separation of a minor child from its parent have not been viewed with favor, 6 Powell, *Real Property* ¶858, at 64; *In Re Carple's Estate*, 140 Misc. 459, 250 N. Y. S. 680 (Surr. Ct. 1931); *In Re Forte's Will*, 149 Misc. 327, 267 N. Y. S. 603 (Surr. Ct. 1933); *In Re Ranney's Estate*, 161 Misc. 626, 292 N. Y. S. 476 (Surr Ct. 1936).

[37] *Holmes* v. *Connecticut Trust & Safe Deposit Co.*, 92 Conn. 507, 103 Atl. 640 (1918) (condition that conveyee's husband abstain from tobacco and liquor held void); cf. *D'Arcangelo* v. *D'Arcangelo*, 137 N. J. Eq. 63, 43 A. 2d 169 (Ch. 1945) (legatee must employ testator's brother as bus driver, at designated salary for a corporation in which legatee had received an interest; invalidated).

[38] Gray, *Restraints on the Alienation of Property*, §259 (2d ed. 1895, A. L. I., *Restatement of Property*, Div. 4, Social Restrictions Imposed upon the Creation of Property Interests, p. 2121 (1944); Browder, *Illegal Conditions and Limitations: Miscellaneous Provisions*, 1 Okla. L. Rev. 237 (1948).

covenants have been limited by common law.[39] Their enforcement in courts of equity[40] and courts of law[41] has been forbidden by the Fourteenth Amendment where race was the reason for the restriction. And, of course, the rule against perpetuities is of ancient lineage.[42]

A business man is not always free to set his own prices. The fair trade acts on the one hand, approved by the Miller-Tydings Act amendment of §1 of the Sherman Act, 15 U. S. C. §1, require some businessmen to sell at fixed prices. Anti-trust concepts on the other hand, originating in the common law, *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940), *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U. S. 211 (1899), and embodied in the statutes of the United States, Robinson-Patman Act, 15 U. S. C. §13 *et seq.*; Clayton Act, 15 U. S. C. §12 *et seq.*; Sherman Anti-Trust Act, 15 U. S. C. §1 *et seq.*, have condemned price discrimination, price fixing, and conspiracies to fix resale prices. The right to select customers has also been curtailed by the antitrust laws,[43] as well as common law, and even the right of a single trader has been greatly limited.[44]

Numerous statutes and ordinances limit property holders in their power to refuse to sell or rent on grounds of

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[39] *Porter* v. *Barrett*, 233 Mich. 373, 206 N. W. 532 (1925).

[40] *Shelley* v. *Kraemer*, 334 U. S. 1.

[41] *Barrows* v. *Jackson*, 346 U. S. 249.

[42] Gray, *The Rule Against Perpetuities* §201 (4th ed. 1942); 6 Powell, *Real Property*, ¶759-827; Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938).

[43] *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959); *Lorain Journal Co.* v. *U. S.*, 342 U. S. 143 (1951).

[44] *United States* v. *Colgate*, 250 U. S. 300 (1919); See *U. S.* v. *Parke Davis & Co.*, 362 U. S. 29 (1960); Rankin, *The Parke, Davis Case*, 1961 Antitrust Law Symposium, New York State Bar Association Section on Antitrust Law 63 (1961).

race or color[45] or to refuse to serve patrons in public accommodations on the grounds of race or color.[46] Historically, the right to select customers has been limited by common law and statute.[47] It is well known that innkeepers

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[45] Cal. Health & Safety Code §35740; Mass. G. L. c. 151B, §6 (Supp. 1961); N. J. Stat. Ann. §18:25-4 (Supp. 1961); Wash. Rev. Code §§49.60.030, 49.60.040 (1957); Cal. Civil Code, §51 (Supp. 1961); Colo. Rev. Stat. Ann. §§69-7-1, to 69-7-7 (Supp. 1960); Conn. Stat. Rev. §53-35 (Supp. 196); Mass. Gen. L. c. 151B, §4 (Supp. 1961), as amended by Acts, 1961, c. 128; Minn. Stat. Ann. §§363.01-.13, as amended by L. 1961, c. 428 to become effective in 12/31/62; Ore. Rev. Stat. §659.033 (1959); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. Y. Executive Law, §290 (Supp. 1962); Pa. Stat. Ann., tit. 43, §953 (Supp. 1961). Cases holding some of the ordinances and statutes constitutional are: *Levitt & Sons, Inc.* v. *Division Against Discrimination*, 31 N. J. 514, 158 A. 2d 177 (1960); *Mass. Comm'n Against Discrimination* v. *Colangelo*, 30 U. S. L. W. 2608 (Mass. 1962); *State Comm'n Against Discrimination* v. *Pelham Hall Apartments*, 10 Misc. 2d 334, 170 N. Y. S. 2d 750 (Sup. Ct. 1958).

[46] Cal. Civil Code, §§51-52 (Supp. 1960); Colo. Rev. Stat. Ann. 25—1—1 *et seq.* (1953); Conn. Gen. Stat. Rev. §53-35 (Supp. 1961); D. C. Code §47-2901 *et seq.* (Supp. 1960); Indiana Stat. Ann. §§10-901, 10-902 (Supp. 1962); Iowa Code Ann. §735.1 (1950); Kansas Gen. Stat. Ann. §21-2424 (1949); Mass. Gen. L. c. 272, §§92A, 98 (1956); Mich. Stat. Ann. §28.343 (Supp. 1959); Minn. Stat. Ann. §327.09 (1947); Mont. Rev. Codes §64-211 (Supp. 1961); Neb. Rev. Stat. §§20-101, 102 (1943); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. J. Stat. Ann. §§10:1-2 to 10:1-7 (1960); N. M. Stat. Ann. §§49-8-1 to 49-8-6 (Supp. 1961); N. Y. Civil Rights Law §40 (1948); Executive Law, §§292(9), 296(2) (Supp. 1962); N. D. Cent. Code, §12-22-30 (Supp. 1961); Ohio Rev. Code §4112.02(G) (Supp. 1961); Ore. Rev. Stat. §§30.670-.680, as amended by L. 1961 c. 247; Pa. Stat. Ann., tit. 18, §4654 as amended by Act No. 19 (1961); R. I. Gen. Laws §§11-24-1 to 11-24-6 (1956); Vt. Stat. Ann., tit. 13, §§1451, 1452 (1958); Wash. Rev. Code, §§49.60.040, 49.60.215 (1962); Wis. Stat. Ann. §924.04 (1958), as amended (Supp. 1962); Wyo. Stat. §§6-83.1, 6-83.2 (Supp. 1961).

[47] Mund, "The Right to Buy—And Its Denial to Small Business," Senate Document #32, 85th Cong., 1st Sess., Select Committee on Small Business (1957); Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135 (1914); Statute of Labourers, 25 Ed. III, Stat. 1 (1350) (no one could refuse to practice his calling to whomsoever applied). The following statutes penalized a businessman's refusal to

and carriers do not have freedom arbitrarily to select or reject patrons. Beale, *The Law of Innkeepers and Hotels* (1906).

The foregoing limitations on the power to control the conduct and associations of others describe particular examples of the general principle that "property rights" are not absolute in the sense that common law, statute, and constitution may not limit or shape them where they have harmful public consequences. Further examples indicate different aspects of this thoroughly settled, fundamental legal truth. Property owners have been compelled to destroy valuable cedar forests which harbored fungus threatening neighboring apple orchards,[48] to spend funds to install fire extinguishing equipment,[49] to limit the size of billboards,[50] and to make loaves of bread a certain size.[51] Moreover, employers have been compelled to allow labor organizational activities to be conducted on their property.[52] And only recently, property holders have been forbidden to use their property in a way which would, in the course of a program of racial discrimination, intimidate their

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serve all comers: (1357), 31 Ed. III, c. 10 (victualers); (1360), 35 Ed. III (fishermen); (1433), 11 Hen. VI, c. 12 (candlers); (1464), 4 Ed. IV, c. 7 (shoemakers); *Lane* v. *Cotton*, 1 Ld. Raym. 646, 655; 1 Salk. 18, 19; 12 Mod. 472, 484 ("If a man takes upon himself a public employment, he is bound to serve the public as far as the employment extends, and for refusal an action lies . . .").

[48] *Miller* v. *Schoene*, 276 U. S. 272 (1928).

[49] *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946).

[50] *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608 (1935); *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269 (1919); *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526 (1917).

[51] *Schmidinger* v. *Chicago*, 226 U. S. 578.

[52] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1955); *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793 (1945).

lessees in the exercise of the franchise. *United States* v. *Beaty*, 288 F. 2d 653 (6th Cir. 1961).

Other facets of the claimed property right to discriminate on the basis of race in these circumstances are clearly separable from the core of Kress's interest in its business. In addition to the fact that no privacy has been intruded upon, the asserted property right did not seek to protect the premises from use alien to their intended function. Petitioners sought only to purchase and consume food in an area provided for such activity. The asserted right to exclude expressed only a preference for racial segregation and not any objection to petitioners' demeanor or conduct. And this was not a private choice. It expressed community custom. The capricious nature of the discrimination was highlighted by the fact that this same store served Negroes and whites alike in fifteen to twenty departments selling over 10,000 items with the sole exception that Negroes are not served at the lunch counter which is reserved for whites (R. 14, 20-22). As in *Shelley* v. *Kraemer*, 334 U. S. 1, 10, the restriction did not limit the type of use made of the premises, nor the type of person or conduct permitted thereon except to refer to race.

Moreover, the property interest enforced below attempted only to achieve discrimination in a store thrown open by the owner to the general public (including Negroes) for his own business advantage. Cf. *Marsh* v. *Alabama*, 326 U. S. 501, 506. The specific area within the store in dispute, i.e., the lunch counter, was a public part of the premises and an integral part of a single commercial establishment serving the public

Consequently, the property interest enforced below is simply a claimed right to enforce racial discrimination in very particular circumstances. It obviously is not true that refusal to enforce this asserted incident of ownership de-

stroys the whole bundle of rights. That result would be contrary to the entire genius of our jurisprudence.

The premise that Kress owns the property does not lead to the ultimate logical extreme that it may absolutely control the conduct and associations of others in the store. Mr. Justice Holmes has written that "All rights tend to declare themselves absolute to their logical extreme, yet in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded and which become strong enough to hold their own when a certain point is reached." *Hudson Cty. Water Co.* v. *McCarter*, 209 U. S. 345, 355. Only last term, Mr. Justice Frankfurter, dissenting, pointed out the indubitable truth that "An end of discrimination against the Negro was the compelling motive of the Civil War Amendments. The Fifteenth expresses this in terms and it is no less true of the Equal Protection Clause of the Fourteenth". *Baker* v. *Carr*, 369 U. S. 186, 285-86. In the case at bar Kress's property is limited by the Fourteenth Amendment and does not reach the constitutionally untenable logical extreme that the states may aid the store in upholding racism. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

F. In Any Event the Convictions Below Must Fall When, in Addition to the Foregoing, South Carolina Has Failed to Protect Negro Citizens in the Right to Equal Access to Public Accommodations.

Here, however, we have more than the elements set forth above—State arrest conviction and prison term; implementation of a community custom of racial segregation generated by state law; enforcement of an odious property right of minor consequence to the owner; elab-

orate state initiative and involvement in establishment and maintenance of the enterprise. Here the State has failed to provide what the *Civil Rights Cases* assumed the States did provide: "a right to enjoy equal accommodation and privileges," which this Court termed "one of the essential rights of the citizen which no state can interfere with." 109 U. S. at 19.

This Court has recognized that States' failure or refusal to act can deny the equal protection of the laws. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725; *Terry* v. *Adams*, 345 U. S. 461, 469; *Truax* v. *Corrigan*, 257 U. S. 312; see, *Lynch* v. *United States*, 189 F. 2d 476 (5th Cir. 1951); *Catlette* v. *United States*, 132 F. 2d 902 (4th Cir. 1943).

Indeed, it is questionable whether the verbal concept of "state action" in equal protection cases rests on more than a misunderstanding,[53] for the phrase, no state shall deny equal protection, refers even more naturally to state inaction than to state action.

Mr. Justice Woods, a member of the majority in the *Civil Rights Cases*, stated in *United States* v. *Hall*, 26 Fed. Cas. 79, 81 (No. 15,282 1871):

> Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.

His concurrence with the majority in the *Civil Rights Cases* may, therefore, be explained by his agreement with their

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[53] See, generally Mr. Justice Harlan dissenting in *Civil Rights Cases*, 109 U. S. 3, 26 62.

assumption that remedies against the discrimination in those cases existed under state law.

This indeed was a view held by some of the legislators concerned with the scope of the Amendment at or around the time of its passage. For example, Representative Wilson of Indiana in debates on the Enforcement Act of April 20, 1871, 17 Stat. 13, argued that the states were under an obligation to assure equality and that failure to do so was a denial of equal protection:

1. The provisions 'no State shall deny' and 'Congress shall have power to enforce' mean that equal protection shall be provided for all persons.

2. *That a failure to enact the proper laws for that purpose, or a failure to enforce them,* is a denial of equal protection. (Emphasis added.)

3. That when there is such a denial Congress may enact laws to secure equal protection.[54]

Representative Lawrence in debates on the Civil Rights Act of 1875 stated:

> What the State permits by its sanction, having the power to prohibit, it does in effect itself.[55]

Senator Pool in debates on the Enforcement Act of May 31, 1870, 16 Stat. 140, argued that:

> . . . but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. *It shall not deny by acts of omission* by a failure to prevent its own citizens

[54] Cong. Globe, 42nd Congress, 1st Sess., p. 483 (1871).

[55] Cong. Rec., 43d Cong., 1st Sess. 412 (1874).

> from depriving by force any of their fellow citizens of these rights.[56] (Emphasis added.)

This view is endorsed by the opinion in the *Civil Rights Cases*, for that decision was based on the assumption that the states in question would provide remedies securing to their citizens the right of access to places of public accommodation without racial discrimination:

> We have discussed the question presented by the law on the assumption *that a right to enjoy equal accomodations* and privileges in all inns, public conveyances and places of public amusement, *is one of the essential rights of the citizen which no state can abridge or interfere with* (109 U. S. at 19). (Emphasis added.)
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> Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and *presumably subject to redress by those laws until the contrary appears* (109 U. S. at 24). (Emphasis added.)

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[56] Cong. Globe, 41st Cong., 2d Sess. 3611 (1870).

Other contemporary congressmen also suggested that state inaction may be as culpable as action: In a speech delivered by Representative Bingham of Ohio, the framer of the key phrases in Section One, it was repeatedly stated that the Fourteenth Amendment granted Congress the power to act on individuals and could provide relief against the denial of rights by the states whether by "acts of omission or commission." Appendix to the Cong. Globe, 42d Congress, 1st Sess. 85. Representative Coburn of Indiana said that a state could deny equal protection by failing to punish individuals violating the rights of others. Cong. Globe, 42d Congress, 1st Sess. 459.

Mr. Justice Bradley's entire opinion was concerned with the question whether the Fourteenth Amendment had conferred on Congress the power to regulate the acts of private individuals when, as he presumed, the States were exercising their responsibilities toward the goal of eliminating racial discrimination. While he concluded in the negative, it is extremely doubtful that the result would have been the same if a state had been found to be in effect sanctioning private discrimination by laxity in this regard. See Konvitz & Leskes, *A Century of Civil Rights* 150 (1961); Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 Cornell L. Q. 375, 376; Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 Colum. L. Rev. 149, 184 (1935); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1, 21 (1959).

This case, therefore is like *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725:

> [T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction . . . the State . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

For here in an area in which the State is deeply involved it has positively and negatively sanctioned the racial segregation which gave rise to this case.

II.

The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment to the Constitution of the United States.

A. The Enforcement of the State and City Segregation Policy and the Interference of the Police Violated Petitioners' Right to Freedom of Expression.

Petitioners were engaged in the exercise of free expression, by verbal and nonverbal requests to the management for service, and nonverbal requests for nondiscriminatory lunch counter service, implicit in their continued remaining in the dining area when refused service. As Mr. Justice Harlan wrote in *Garner* v. *Louisiana*: "We would surely have to be blind not to recognize that petitioners were sitting at these counters, when they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." 368 U. S. at 201. Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. They did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other forms of expression in the store possibly inappropriate to the time and place. Rather they offered to purchase in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas," *Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, *J.*, dissenting, within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education* v.

Barnette, 319 U. S. 624, 633-634 (flag salute); *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449 (freedom of association).

Questions concerning freedom of expression are not resolved merely by reference to the fact that private property is involved. The Fourteenth Amendment right to free expression on private property takes contour from the circumstances, in part determined by the owner's privacy, his use and arrangement of his property. In *Breard* v. *Alexandria*, 341 U. S. 622, 644 the Court balanced the "householders' desire for privacy and the publisher's right to distribute publications" in the particular manner involved, upholding a law limiting the publisher's right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U. S. 141, where different kinds of interests led to a corresponding difference in result. Moreover, the manner of assertion and the action of the State, through its officers, its customs and its creation of the property interest are to be taken into account.

In this constitutional context it is crucial, therefore, that the stores implicitly consented to the protest and did not seek intervention of the criminal law. For this case is like *Garner* v. *Louisiana*, *supra*, where Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. Petitioners informed the management that there would be a protest and received assurance that the management would not resort to the criminal process. Petitioners were not asked to leave the counter until the police arrived and the manager talked with the police. Petitioners were not permitted, at the trial, to inquire if the request to leave was arranged by the police (R. 22, 23). It does not appear that anyone connected with the store signed an affidavit or complaint against

petitioners. The police officer proceeded immediately to arrest the petitioners without any request to do so on the part of anyone connected with the store.

In such circumstances, petitioners' arrest must be seen as state interference in a dispute over segregation at this lunch counter, a dispute being resolved by persuasion and pressure in a context of economic and social struggle between contending private interests. The Court has ruled that judicial sanctions may not be interposed to discriminate against a party to such a conflict. *Thornhill* v. *Alabama, supra; San Diego Bldg. Trades Council* v. *Garmon*, 349 U. S. 236.

But even to the extent that the store may have acquiesced in the police action a determination of free expression rights still requires considering the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action supports. *Marsh* v. *Alabama*, 326 U. S. 501.

In *Marsh*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama, supra*, involving picketing on company-owned property; see also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); *United Steelworkers* v. *N.L.R.B.*, 243 F. 2d 593, 598 (D. C. Cir. 1956), reversed on other grounds, 357 U. S. 357, and compare the cases mentioned above with *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U. S. 240, 252, condemning an employee

seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it." See also *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by these trespass prosecutions is support of the property owner's discrimination, which the manager testified was caused by the State's segregation custom and policy and the express terms of the City Ordinance. This is the only "interest" that the property owner can be found to have asserted.

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the State has the right to prevent. *Schenck* v. *United States*, 249 U. S. 52. The only "substantive evil" sought to be prevented by these trespass prosecutions is the stifling of protest against the elimination of racial discrimination, but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination. See *Cooper* v. *Aaron*, 358 U. S. 1; *Terminiello* v. *Chicago*, 337 U. S. 1; *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Cir. 1957), cert. denied 332 U. S. 851.

B. The Convictions Deny Petitioners' Right to Freedom of Expression in That They Rest on a Statute Which Fails to Require Proof That Petitioners Were Requested to Leave by a Person Who Had Established Authority to Issue Such Request at the Time Given.

In the courts below petitioners asserted that the statute in question denied due process of law secured by the Fourteenth Amendment to the Constitution of the United States in that it did not require that the person requesting them to leave the lunch counter establish his authority to make the demand. Although this issue was pressed below, the Supreme Court of South Carolina failed to construe the statute to require proof that the person who requested them to leave establish his authority.

If in the circumstances of this case free speech is to be curtailed, the least one has a right to expect is reasonable notice in the statute under which convictions are obtained, to that effect. *Winters* v. *New York*, 333 U. S. 507. Here, absent a statutory provision that the person making the request to leave be required to communicate that authority to the person asked to leave, petitioners, in effect, have been convicted of crime for refusing to cease their protests at the request of a person who could have been a stranger. The stifling effect of such a rule on free speech is obvious. See *Wieman* v. *Updegraff*, 344 U. S. 183; *Smith* v. *California*, 361 U. S. 147.

The vice of lack of fair notice was compounded where, as here, petitioners were convicted under a statute which designated two separate crimes, see *supra* p. 2, and a warrant which failed to specify under which section the prosecution proceeded (R. 5, 2, 3). Moreover, the warrant and the trial court stated that petitioners were charged with "trespass after warning" (R. 2) (Section (1) of the Statute speaks of being "warned"; Section (2) "without having

been warned"), but the prosecution offered no proof that petitioners had been "warned" within six months as required by Section (1) and apparently proceeded on the theory that Section (2) of the statute was involved.

This record is barren of any attempt by the City of Greenville to prove that the person who requested petitioners to leave identified his authority to do so to petitioners, and the courts of South Carolina, although urged by petitioners, failed to require such proof. While one of the petitioners brought out, when questioned by her own counsel, that she had spoken to the manager previously,[57] there is no evidence that the other petitioners knew the authority of the person who gave the order to leave. With rights to freedom of expression at stake, the City should be required to provide clear and unambiguous proof of all the elements of the crime. Identification of authority to make the request to leave is all the more important because of the active role played by the police in this case, for if the police were enforcing segregation clearly petitioners had a right to remain at the counter. *Garner* v. *Louisiana, supra.*

No one ordinarily may be expected to assume that one who tells him to leave a public place, into which the proprietor invited him and in which he has traded, is authorized to utter an order to leave when no claim of such authority is made. This is especially true in the case of a Negro seating himself in a white dining area in Greenville, South Carolina—obviously a matter of controversy and one which any stranger, or the police of a city with a segregation ordinance, might be expected to volunteer strong views. If the statute in question is interpreted to mean that one must leave a public place under penalty of being held a criminal

[57] She also testified that the police, not the manager, gave the order for petitioners to leave (R. 37, 41).

when so ordered to do so by a person who later turns out to have been in authority without a claim of authority at the time, it means as a practical matter, that one must depart from public places whenever told to do so by anyone; the alternative is to risk fine or imprisonment. Such a rule might be held a denial of due process. Cf. *Lambert* v. *California*, 335 U. S. 225. But if such is the rule the statute gives no fair warning, *Winters* v. *New York, supra; Burstyn* v. *Wilson*, 343 U. S. 495; *Saia* v. *New York*, 334 U. S. 558; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. Absent such notice, petitioners surely were entitled to assume that one may go about a public place under necessity to observe orders only from those who claim with some definiteness the right to give them.

Indeed, as a matter of due process of law, if it is the rule one must obey all orders of strangers to leave public places under penalty of criminal conviction if one uttering the order later turns out to have had authority, petitioners are entitled to more warning of its harshness than the statute's text affirmed. Cf. *Connally* v. *General Construction Co.*, 269 U. S. 385; *Lanzetta* v. *New Jersey*, 306 U. S. 451. Otherwise many persons—like these petitioners—may be held guilty of crime without having intended to do wrong. This Court has said, however, that:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. Morrissette v. U. S., 342 U. S. 246, 250.

Morrissette, of course, involved a federal statute as treated in the federal courts. But it expresses the fundamental view that *scienter* ought generally to be an element in criminality. See Sayre, *Public Welfare Offenses*, 33 Columbia L. Rev. 55, 55-6 (1933). The pervasive character of *scienter* as an element of crime makes it clear that a general statute like the ordinance now in question, in failing to lay down a *scienter* requirement, gives no adequate warning of an absolute liability. Trespass statutes like the one at bar are quite different from "public welfare statutes" in which an absolute liability rule is not unusual. See *Morrissette* v. *United States, supra*, 342 U. S. at 252-260.

On the other hand, however, if South Carolina were to read a *scienter* provision into this ordinance for the first time—which it has failed to do although the issue was squarely presented in this case—the lack of the necessary element of guilt, notice of authority, would require reversal under authority of *Garner* v. *Louisiana, supra; Thompson* v. *City of Louisville*, 362 U. S. 199.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

JACK GREENBERG
CONSTANCE BAKER MOTLEY
JAMES M. NABRIT, III
MICHAEL MELTSNER
10 Columbus Circle
New York 19, N. Y.

MATTHEW J. PERRY
LINCOLN C. JENKINS, JR.
Columbia, South Carolina

WILLIE T. SMITH
Greenville, South Carolina

Attorneys for Petitioners

LEROY CLARK
WILLIAM T. COLEMAN, JR.
WILLIAM R. MING, JR.
LOUIS H. POLLAK
Of Counsel

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 11

JOHN THOMAS AVENT, ET AL., PETITIONERS

v.

STATE OF NORTH CAROLINA

No. 58

RUDOLPH LOMBARD, ET AL., PETITIONERS

v.

STATE OF LOUISIANA

No. 66

JAMES GOBER, ET AL., PETITIONERS

v.

CITY OF BIRMINGHAM

No. 67

F. L. SHUTTLESWORTH, ET AL., PETITIONERS

v.

CITY OF BIRMINGHAM

No. 71

JAMES RICHARD PETERSON, ET AL., PETITIONERS

v.

CITY OF GREENVILLE

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF NORTH CAROLINA, LOUISIANA, AND SOUTH CAROLINA, AND TO THE COURT OF APPEALS OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE[1]

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina in *Avent* (A. 72–90)[2] is reported at 253 N.C. 580, 118 S.E. 2d 47.

The opinion of the Supreme Court of Louisiana in *Lombard* (L. 141–151) is reported at 241 La. 958, 132 So. 2d 860. The opinion of the Criminal District Court of Orleans Parish overruling petitioners' motion to quash (L. 28–86) is not reported.

The opinion and orders of the Alabama Court of Appeals (G. 57–64, 88, 124, 144, 178, 194, 220, 236, 262, 278) and the orders of the Supreme Court of Alabama (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278) in *Gober* are reported, *inter alia*, at 133 So. 2d 697–708.

The opinions of the Alabama Court of Appeals (S. 42–44, 67) and the orders of the Supreme Court of Alabama (S. 46, 69) in *Shuttlesworth* are reported at 134 So. 2d 213.

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[1] This brief will not consider *Wright* v. *Georgia*, No. 68. Since that case involves arrests for unlawfully assembling on *municipal* property, it does not present the paramount issue considered in the cases discussed in this brief as to the rights of private businesses to exclude Negroes from all or a portion of their premises. We believe, however, that the convictions in *Wright* should be reversed for reasons advanced by the petitioners in that case. The United States, as *amicus curiae*, is filing a separate brief in *Griffin* v. *Maryland*, No. 26, this Term.

[2] The records in *Avent* v. *North Carolina*, No. 11, *Lombard* v. *Louisiana*, No. 58, *Gober* v. *Birmingham*, No. 66, *Shuttlesworth* v. *Birmingham*, No. 67, and *Peterson* v. *Greenville*, No. 71, are referred to as "A.," "L.," "G.," "S.," and "P.," respectively.

The opinion of the Supreme Court of South Carolina in *Peterson* (P. 55–59) is reported at 122 S.E. 2d 826. The opinion of the Greenville County Court (P. 50–52) is not reported.

JURISDICTION

The judgment of the Supreme Court of North Carolina in *Avent* was entered on January 20, 1961 (A. 90).

The judgment of the Supreme Court of Louisiana in *Lombard* was entered on June 29, 1961 (L. 149).

The judgments of the Alabama Court of Appeals in *Gober* were entered on May 30, 1961 (G. 57, 88, 124, 144, 178, 194, 220, 236, 262, 278). Petitions to the Supreme Court of Alabama for writs of certiorari were denied on September 14, 1961 (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278); and applications for rehearing were overruled on November 2, 1961 (G. 71, 92, 128, 144, 182, 194, 224, 236, 266, 278.)

The judgments of the Alabama Courts of Appeals in *Shuttlesworth* were entered on May 30, 1961 (S. 43, 66). Application for rehearing before the Court of Appeals of Alabama was denied on June 20, 1961 (S. 45, 68). A petition to the Supreme Court of Alabama for a writ of certiorari was denied on September 25, 1961 (S. 46, 69), and application for rehearing was overruled on November 16, 1961 (S. 51, 74).

The judgment of the Supreme Court of South Carolina in *Peterson* was entered on November 10, 1961 (P. 55), and a petition for rehearing was denied on November 30, 1961 (P. 62).

The petitions for writs of certiorari were granted by this Court on June 25, 1962 (370 U.S. 934–935; A. 92, L. 152, G. 279, S. 75, P. 65). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Petitioners are Negroes who were invited into department and variety stores as customers. They were refused service at lunch counters or in lunch rooms under the proprietor's practice of enforcing racial segregation in the store's dining facilities. In Nos. 11, 66, 67 and 71, there was little evidence as to motive, but the proprietor's practice of racial discrimination in fact conformed to current municipal ordinances requiring racial segregation in public eating places. In No. 58, although there was no ordinance specifically requiring segregation in public eating places, the proprietor's practice of racial discrimination knowingly conformed to a current and pervasive State policy of maintaining racial segregation expressed in numerous legislative enactments and official declarations. Petitioners in each case refused to leave the lunch counters or lunch rooms upon being denied service. They were arrested and convicted of criminal trespass or a similar offense.

The questions presented are:

1. Whether, upon the records in Nos. 11, 66, 67 and 71, the convictions are sufficiently related to the ordinances requiring racial segregation that they should be set aside on the ground that they result from a denial of equal protection of the laws in violation of the Fourteenth Amendment.

2. Whether, upon the record in No. 58, the convictions are sufficiently related to the State laws and policies maintaining racial segregation that they should be set aside on the ground that they result from a denial of equal protection of the laws in violation of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

The fundamental constitutional issue in these cases is to what extent the Fourteenth Amendment condemns, as a denial of equal protection of the laws, enforcement by the States of racial segregation in private businesses open to the general public. This problem involves not only the power of the States but also the constitutional rights of millions of American citizens. On the one hand, millions of Negroes (as well as some other groups) are subjected to racial discrimination in private businesses open to the public. The "sit-in" activities resulting in petitioners' convictions were part of a widespread peaceful protest against this practice. Petitioners claim that the involvement of the States in their convictions violates the equal protection clause of the Fourteenth Amendment. On the other hand, the respondents invoke both the power of the States to preserve order and also the freedom and responsibility of individuals to make their own decisions concerning the use of private property and choice of associates. Thus, the basic issue in these cases involves the competing claims of large numbers of citizens, and of the States, and is of grave importance to the country as a whole.

The petitions for certiorari in each of these cases urge various grounds for reversal. Since the primary interest of the United States is in the fundamental question which is described above, we will confine this brief on behalf of the United States to a discussion of that question.

STATEMENT[3]

1. AVENT V. STATE OF NORTH CAROLINA, NO. 11

a. Statutes Involved.—Chapter 13, Section 42, of the Code of Durham, North Carolina (1947), provides:

> In all licensed restaurants, public eating places and 'weenie shops' where persons of the white and colored races are permitted to be served with, and eat food, and are allowed to congregate, there shall be provided separate rooms for the separate accommodation of each race. The partition between such rooms shall be constructed of wood, plaster or brick or like material, and shall reach from floor to the ceiling. Any person violating this section shall, upon conviction, pay a fine of ten dollars and each day's violation thereof shall constitute a separate and distinct offense.

Petitioners were convicted of violating Section 14–134 of the North Carolina General Statutes, which provides:

> *Trespass on land after being forbidden.* * * * If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor and on conviction, shall be fined not

[3] We have set forth fully only the facts of each of the cases that may be relevant to the legal issues that we consider in this brief.

exceeding fifty dollars or imprisoned not more than thirty days * * *.

b. The Facts.—On May 6, 1960, petitioners, five Negro students from North Carolina College and two white students from Duke University, both of which are in Durham, North Carolina, entered Kress' Department Store in Durham (A. 1, 2, 4, 5, 6, 8, 9, 35). On the two selling floors of the store, there are approximately fifty counters (including a "standup" lunch counter) which serve Negroes and whites without racial distinction (A. 21, 22). No sign at the store's entrance barred or conditioned Negro patronage (A. 22). Petitioners made various purchases, as some of them had in the past, and eventually went to the basement lunch counter (A. 21, 35, 39, 41, 43, 46, 47, 48).[4] There a sign stated "Invited Guests and Employees Only" (A. 23). The manager testified that, although no invitations as such were sent out, white persons automatically were considered guests; Negroes, and whites accompanied by Negroes, were not

[4] Petitioners were participants in an informal student organization which opposed racial segregation. They believed that they had a right to service at Kress' basement lunch counter after having been customers in other departments (A. 36, 40, 44–45). Some had previously picketed the store to protest its policy of welcoming Negroes' business while refusing them lunch counter service (A. 41, 43, 46, 48, 49). Some of the petitioners had requested and had been denied service on previous occasions at Kress' lunch counter (A. 37). Some of the petitioners testified that they expected to be served at the basement lunch counter because they had been served upstairs (A. 39, 48, 49). Various petitioners testified that they did not expect to be arrested for trespassing on this occasion (A. 37, 38, 41, 43, 48, 49).

(A. 21–23).[5] The counter was separated from other departments by an iron railing (A. 21). The store manager testified that the entrances to the counter were chained, but petitioner Streeter denied this (A. 21, 37).

The manager declined to serve the students and asked them to leave (A. 21). He stated that if Negroes wanted service they might obtain it at a stand-up counter upstairs (A. 22). The manager then called the police (A. 21). After being asked by the police officers to leave, petitioners persisted in their refusal and were arrested for trespass (A. 21, 24–25).[6]

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[5] The manager testified that "the luncheonette was open for the purpose of serving customers food. Customers on that date were invited guests and employees" (A. 21). He testified further that "We had signs all over the luncheonette to the effect that it was open for employees and invited guests. Mr. Pearson [petitioners' Negro attorney], I do not consider you an invited guest, under the circumstances right now. I do consider Mr. Murdock [the State Solicitor] an invited guest under the circumstances" (A. 22). He also testified: "I would serve this young lady (indicating the white female defendant), but I asked her to leave when she gave her food to a Negro. She was my invited guest at that time, up until the time that I asked her to leave" (A. 23).

Portions of the record suggest that the police were already present at the time the manager first asked the students to leave (A. 35, 40, 42, 44, 47, 48). For example, petitioner Phillips testified that "When I took a seat at the lunch counter, I was approached by Mr. W. K. Boger, who said, 'You are not an invited guest, and you are not an employee; so I am asking you to leave.' Before I could ask him who he was, the police officer directed me to the back of the store" (A. 40).

[6] It is not clear whether, after the arrival of the police officer, the manager again asked petitioners to leave (compare A. 21 with A. 24–25).

Petitioner Nelson, one of the white students, was asked to leave after she offered food to Negroes. The manager told her

The Kress manager explained his refusal to serve the students at the trial (A. 22–23):

> * * * It is the policy of our store to wait on customers dependent upon the customs of the community. * * * It is the policy of our store to operate all counters in the interest of the customs of the community. * * * In the interest of public safety it is our policy to refuse to serve Negroes at the luncheonette downstairs in our seating arrangements. It is also the policy of Kress to refuse the patronage of white people in the company of Negroes at that counter. Even if Negroes accompanied by white people were orderly at our luncheonette because of the policy of the community we would not serve them, and that was our policy prior to May 6, 1960. * * * It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs, "Invited Guests and Employees Only."

Petitioners were indicted in the Superior Court of Durham County, the indictments stating that each petitioner (A. 1–10):

> with force and arms, * * * did unlawfully, willfully, and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store * * * said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and

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that she was "antagonizing the customers" (A. 42). Petitioner Brown was told by the manager that "[t]he custom has not been changed, and you will have to leave" (A. 44).

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> agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said [petitioner] after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that * * * [petitioner] had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the state.[7]

Petitioners pleaded not guilty and were tried by a jury on June 30 and July 1, 1960 (A. 15–16). The jury returned a verdict of guilty (A. 16). Three of the petitioners received thirty-day sentences, one received a twenty-day sentence, one received a fifteen-day sentence, and, in two cases, sentence was continued for two years (A. 16–20).

On January 20, 1961, the Supreme Court of North Carolina affirmed the convictions (A. 73). In a lengthy opinion, the court emphasized that (A. 78):

> No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants,[8] and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute for-

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[7] The indictments of all the petitioners carried a racial designation, *viz.*, "CM," "WM," "CF," and "WF" (A. 2, 3, 5, 6, 7, 9, 10).

[8] A municipal ordinance in Durham, however, does require segregation in restaurants. See *supra*, p. 6.

> bidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. * * *

2. LOMBARD V. STATE OF LOUISIANA, NO. 58

a. Statute Involved.—The Louisiana statute under which petitioners were convicted is La. R.S. 14:59(6), as amended 1960, which provides:

> Criminal mischief is the intentional performance of any of the following acts:
>
> * * * * *
>
> (6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business.

The statute states that "[w]hoever commits the crime of criminal mischief shall be fined not more than $500.00, or imprisoned for not more than one year, or both."

b. The Facts.—On September 10, 1960, one week prior to the "sit-in" demonstration out of which this case arose, a group of Negroes conducted at Woolworth's Department Store in New Orleans, Louisiana, the first "sit-in" demonstration to occur in that city. On the same day, the New Orleans Superintendent of

Police issued the following statement, which was published in the New Orleans *Times-Picayune* (L. 17, 139–140):

> The regrettable sit-in activity today at the lunch counter of a Canal St. chain store by several young white and Negro persons causes me to issue this statement to the citizens of New Orleans.
>
> We urge every adult and juvenile to read this statement carefully, completely and calmly.
>
> First, it is important that all citizens of our community understand that this sit-in demonstration was initiated by a very small group.
>
> We firmly believe that they do not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population.
>
> We believe it is most important that the mature responsible citizens of both races in this city understand that and that they continue the exercise of sound, individual judgment, goodwill and a sense of personal and community responsibility.
>
> Members of both the white and Negro groups in New Orleans for the most part are aware of the individual's obligation for good conduct—an obligation both to himself and to his community. With the exercise of continued, responsible law-abiding conduct by all persons, we see no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans.
>
> At the same time we wish to say to every adult and juvenile in this city that the police department intends to maintain peace and order.

> No one should have any concern or question over either the intent or the ability of this department to keep and preserve peace and order.
>
> As part of its regular operating program, the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property.
>
> We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest.
>
> Finally, we want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana.[9]

On September 13, 1960, four days prior to the "sit-in" demonstration out of which this case arose, Mayor DeLesseps Morrison also issued a statement which was printed in the *Times-Picayune*. The Mayor said (L. 14, 15, 138–139):

> I have today directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted.
>
> The police department, in my judgment, has handled the initial sit-in demonstration Friday

[9] At the trial of the petitioners in *Lombard*, the Superintendent of Police testified that the reason for his statement was that he "was hoping that situations of this kind would not come up in the future to provoke any disorder of any kind in the community" (L. 17).

and the follow-up picketing activity Saturday in an efficient and creditable manner. This is in keeping with the oft-announced policy of the New Orleans city government that peace and order in our city will be preserved.

I have carefully reviewed the reports of these two initial demonstrations by a small group of misguided white and Negro students, or former students. It is my considered opinion that regardless of the avowed purpose or intent of the participants, the effect of such demonstrations is not in the public interest of this community.

Act 70 of the 1960 Legislative session redefines disturbing the peace to include "the commission of any act as would foreseeably disturb or alarm the public."

Act 70 also provides that persons who seek to prevent prospective customers from entering private premises to transact business shall be guilty of disorderly conduct and disturbing the peace.

Act 80—obstructing public passages—provides that "no person shall wilfully obstruct the free, convenient, and normal use of any public sidewalk, street, highway, road, bridge, alley or other passage way or the entrance, corridor or passage of any public building, structure, water craft or ferry by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein."

It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demon-

strations cease and that henceforth they be prohibited by the police department.[10]

On September 17, 1960 (one week after the Superintendent's statement and four days after the Mayor's statement), the petitioners here, three Negroes and one white person, sat down at counter seats at the white refreshment counter at McCrory's Five and Ten Cents Store in New Orleans. McCrory's, which "caters to the general public," is a branch of a national chain doing business in thirty-four states (L. 19).

Although no sign indicated any racial restriction as to service, the counter where petitioners sat had been restricted to white patronage since 1938 (L. 105, 110). The counter manager (Mr. Graves) advised petitioners that he could not serve them there and that

[10] The Mayor testified at petitioners' trial that the superintendent of police "serves under [the Mayor's] direction," and that "[i]t is the policy of my office and that of the City Government to set the line or direction of policy to the police department" (L. 13). The Mayor further testified that his statement was issued "following the initial sit-in and follow-up demonstration the next day, I believe by picketing in the same area, and I outlined to the police department and the community the two acts of the Legislature 70 and 80 which dealt with this matter and gave the reasons in the public interest that we should carry out the intent and purpose of the law" (L. 14). He testified that his statement "encompasse[d] any laws covering questions of disturbing the peace, of public acts which would create a disturbance or confusion, disturbances of the peace, and specifically quoted these two acts because they are of recent nature and somewhat specific in regard to the question, but I have a feeling that matters of this kind, when persons engage in this type of demonstration as a natural consequence will create disturbances of the peace and in many cases set off chain reactions that can be much more serious" (L. 16).

they could be served at a colored counter in the rear of the store (L. 105, 110). The petitioners made no reply (L. 105). Although petitioners were not creating a disturbance or doing anything except sitting at the counter (L. 108), Mr. Graves closed the counter because Negroes were present (L. 105, 108). Petitioners nonetheless remained seated. The police were called by store personnel (L. 107), and the store manager, Mr. Barrett, arrived (L. 112). Shortly thereafter several police officers arrived (L. 112). Mr. Barrett informed the police that he wanted the Negroes to leave, but an officer informed him that he must request them to leave in the presence of the police (L. 126). The police then witnessed Mr. Barrett's request to the petitioners that they leave the counter area (L. 113). When petitioners did not leave, a police officer, Major Reuther, informed them that they were violating the law "and if the manager insisted that they move we would have to put them under arrest" (L. 129). After a short period, the police arrested petitioners (L. 129), who were charged with criminal mischief under La. R.S. 14:59(6), *supra*, p. 10.

Testimony was adduced at a hearing on petitioners' motion to quash the information and at the trial on the merits concerning the reasons that petitioners were not served at the counter. The store manager testified that he exercises discretion as to whether Negroes should be served [11] (L. 21), and that "[t]he policy

[11] Mr. Barrett testified that he was authorized by the "national office" of McCrory's chain to determine the segregation policies of the New Orleans store (L. 21). The trial court

[as to serving Negroes] is determined by local tradition, law and custom, as interpreted by me" (L. 21). The manager testified further that when, as occasionally happened, Negroes sought service at a white lunch counter he "would tell them we had a colored counter in the back, because they might be passing through from the North and not understand Southern customs" (L. 117–118).[12]

When asked whether "in the last 30 to 60 days [he had] entered into any conference with other department store managers here in New Orleans relative to sit-in problems" (L. 22) the manager replied that "[w]e have spoken of it" (L. 23).

Mayor Morrison and the Superintendent of Police testified concerning the custom in New Orleans with respect to segregated eating facilities. The Mayor stated that to his personal knowledge no lunch counter in the city served both Negroes and whites together (L. 15). The Superintendent of Police testified that, in his experience as a member of the police force for fifteen years, and as a resident of New Orleans, he had not known of "any public establishments that cater to both Negroes and whites at the same lunch counter in the city of New Orleans" (L. 18).

The trial court refused to allow a series of questions designed to ascertain whether the manager's decision

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sustained objections to questions designed to reveal the practice of McCrory's stores in other states (L. 19–20, 22) and the power of the national office to overrule a manager's decision (L. 22).

[12] Mr. Barrett also replied "[y]es, sir" to counsel's question whether his decision was based on "state policy and practice and custom in this area" (L. 25).

was dictated or influenced by "state policy." Thus, Mr. Barrett was not permitted to say whether he "discussed methods and means to handle these situations if they arise in any particular department store" (L. 23), although counsel observed that the "purpose of this Your Honor is a question of conformity with state policy" (L. 23). Again, the manager was not allowed to reply to questions as to whether "if the state policy or practice would be different you would exercise your discretion in a different manner" and whether "if there was no custom of segregated lunch counters or no state policy, the general atmosphere would be different, would you allow Negroes to eat at white lunch counters" (L. 25, 26). Similarly, the trial court ruled out a question to Mr. Graves, the counter manager, as to "why [he was] not allowed to serve them," despite counsel's contention that the question was "material, because if Mr. Graves felt there was some state policy that prevented him from serving these defendants this is a clear state action" (L. 109–110).[11]

The trial court also excluded a series of questions designed to ascertain whether the police had been actively involved in the manager's decision to refuse service to petitioners. Captain Cutrera, one of the arresting officers, was not permitted to say whether

[11] Petitioners introduced into evidence a series of bills, some of which were ultimately enacted into law, of the 1960 session of the Louisiana state legislature. Petitioners contended that these bills and statutes (including the criminal mischief statute under which petitioners were convicted) demonstrated a state policy of racial discrimination (see L. 26–27 and the opinion of the Louisiana Supreme Court, quoted *infra*, p. 19).

"there was any plan approved by the police as to what [the store personnel] should do in the event of a sit-in" (L. 127–128). And Mr. Barrett was not allowed to reply to the question whether he had "ever met with members of the New Orleans Police Department and discussed problems of sit-in demonstrations and how you or how they should be handled if they arise in your store?" (L. 23). Similarly, counsel was not allowed to determine whether Mr. Graves had called the police "on his own initiative;" the question was asked in order to learn whether he had "any plan * * * with the police" (L. 107).[14]

Petitioners were convicted of violating the "criminal mischief" law, sentenced to sixty days in jail, and fined $350 each (L. 8). The convictions were affirmed by the Supreme Court of Louisiana. *State* v. *Goldfinch*, 132 So. 2d 860, 241 La. 958 (1961) (L. 141–149). The State Supreme Court rejected the contention that "by content, reference and position of context [the statute] is designed to apply to, and be enforced in an arbitrary manner against, members of the Negro race and those acting in concert with them" (L. 145), stating (L. 145–146):

> * * * In aid of this assertion certain House bills of the Louisiana legislature for 1960, introduced in the same session with the contested statute, were offered in evidence. All of these bills did not become law, but some did. It is declared that this law and the others enacted

[14] Mr. Graves did testify at another point that he had called the police "as a matter of routine procedure," and that he had "no particular plan" for the handling of sit-ins; they were to be handled like any other emergency situation (L. 106).

> during the same session were designed to apply to and be enforced against, in an arbitrary manner, members of the Negro race. We have carefully reviewed the provisions of these bills referred to which were enacted into law and nowhere in their content or context do we find that any of them seek to discriminate against any class, group, or race of persons. We therefore find no merit in this contention and, accordingly, dismiss it as being unsupported.

The court also considered the contention that "the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers, and * * * that this action of McCrory's was not its own voluntary action, but was influenced by the officers of the state" (L. 146). It held (L. 146–147):

> The conclusion contended for is incompatible with the facts. Rather, the testimony supports a finding that the manager of McCrory's had for the past several years refused service to Negroes, that the policy of the store was established by him, that he had set out the policy and followed it consistently; that Negroes had habitually been granted access to only one counter within the store and a deliberately provoked mischief and disturbance such as the one he complained of here had not previously occurred. * * *
>
> Even under the provision of the questioned statute it is apparent that a prosecution is dependent upon the will of the proprietor, for only after he has ordered the intruder to relinquish possession of his place of business does a violation of the statute occur. The state, therefore, without the exercise of the pro-

> prietor's will can find no basis under the statute to prosecute.
>
> These facts lead us to the conclusion that the existence of a discriminatory design by the state, its officers or agents, or by its established policy, assuming such could have been shown, would have had no influence upon the actions of McCrory's. The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any governmental action, design, or policy—state or municipal—and the arrest was accomplished in keeping with McCrory's business practice established and maintained long before the occasion which defendants seek to associate with a discriminatory design by the state. * * *

The court further held that no constitutional provision prevented a proprietor of a restaurant from refusing service on the basis of race. It said (L. 148):

> The defendants have sought to show through evidence adduced at the trial that there is no integration of the races in eating places in New Orleans and, therefore, the custom of the state is one that supports segregation and hence state action is involved. * * *

In answer to this contention, the court stated that "segregation of the races * * * is not required by any * * * law of the State * * * but is the result of the business choice of the individual proprietors, both white and Negro, catering to the desires and wishes of their customers, regardless of what may stimulate and form the basis of the desires" (L. 148).

3. GOBER V. CITY OF BIRMINGHAM, NO. 66

a. Statutes Involved.—Section 369 of the General City Code of Birmingham, Alabama (1944), provides:

> *Separation of races.*—It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment.

Petitioners were convicted of violating Section 1436 of the General City Code of Birmingham, Alabama (1944), which provides:

> *After warning.*—Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties.

b. The Facts.—This case involves ten different petitioners. On March 31, 1960, the petitioners, in five groups of two, entered five department stores in the City of Birmingham. The facts relating to each of the cases are as follows:

(i) *Gober* and *Davis.*—Petitioners entered Pizitz's Department Store in Birmingham, Alabama (G. 43, 50). Petitioner Davis purchased stocks, toothpaste, and a handkerchief (G. 43). They then proceeded to the mezzanine lunch counter where they attempted to

order, but were ignored by the waitresses (G. 44). Although only white persons were seated at the lunch counter at the time, there was no sign indicating that the counter was reserved for whites (G. 44, 50). Petitioners were approached by Mr. Pizitz, assistant to the president of the store. Pizitz, who did not identify himself to petitioners, told them that Negroes were served elsewhere in the store (G. 23, 44–45). They were not directly asked to leave the store or the area in which they were sitting (G. 45). Mr. Pizitz's conversation with petitioners was described as follows (G. 23–24):

> He asked the defendants to leave the tea room area, told them that they could be served in the Negro restaurant in the basement.
>
> * * * * *
>
> He told them that they couldn't be served there and we had facilities in the basement to serve them. * * * He told them it would be against the law to serve them there. * * *

Mr. Gottlinger, the controller of Pizitz's, testified that no official of Pizitz called the police (G. 26). He also testified that no official of the company filed a complaint (G. 27).

Police Officer Martin of the Birmingham Police made the arrests (G. 19). He had received a report from a superior officer that there was a disturbance at Pizitz's (G. 19). He went to the dining area, found it closed to customers, and saw two Negro men seated and conversing together (G. 18–19). Martin heard no one speak to petitioners (G. 19). Following the direction of his superior, and without

himself warning petitioners, Martin placed them under arrest and charged them with trespassing after warning (G. 20).

(ii) *Hutchinson* and *King*.—Petitioners took seats at tables in the mezzanine dining area at Loveman's Department Store (G. 107, 115). Loveman's is a general department store and invites Negro trade in all departments with the exception of dining facilities (G. 114, 120). The dining room is a concession run by the Price Candy Company but follows Loveman's policies and regulations (G. 114).[15]

Soon after petitioners were seated, Mr. Kidd, a member of the store's protective department, appeared.[16] At the trial, he described what occurred in these terms (G. 115):

> There was two colored boys sitting on the mezzanine and I notified the people who were milling around, I notified all of the people, white people, to leave as we were closing the mezzanine in their presence—I did not directly speak to the two colored boys who were sitting at a table * * *.[17]

Mr. Kidd announced three times that the dining area was closed and put up signs to that effect (G.

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[15] Mr. Schmid, the dining area concessionaire, testified that he knew of no dining facilities in Loveman's for Negroes (G. 113–114). However, Mr. Kidd of Loveman's protective department testified that the store did have separate dining facilities for Negroes (G. 119).

[16] Apparently, a restaurant employee called the protective department (G. 112). According to Mr. Schmid, this had been done since, "naturally," there was a "disturbance of the peace" (G. 112). The only actual disturbance described, however, was that "* * * the waiters went off the floor" (G. 112).

[17] Mr. Schmid likewise did not speak to petitioners (G. 110).

116).[18] About forty or fifty people were seated at the time these announcements were made, and some of them apparently stayed and finished their lunches (G. 111).

About twenty-five white patrons were seated when the police arrived, but none were arrested (G. 113).[19]

There is nothing in the record to indicate who called the police.[20] Police officer Martin, who arrested petitioners, had been told by a motorcycle policeman to go to Loveman's (G. 107). At the dining area, he observed a rope tied from one post to another and a sign stating that the area was closed (G. 107). He saw two Negro men at a table but had no conversation with them "other than to tell them they were under arrest" (G. 107). Officer Martin did not know of his own personal knowledge that anyone from Loveman's had asked petitioners to leave but believed that his superior officer knew this (G. 108).[21] Martin

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[18] When asked what caused him to close the lunchroom, Kidd testified: "The commotion that was on the mezzanine. I did not know what was the cause of the commotion. When I began closing the place down then I noticed after the crowd had dispersed that the two colored boys were occupying a table" (G. 117). The commotion Kidd referred to was the people standing up and milling around (G. 117).

[19] Mr. Kidd testified, however, that everyone left immediately when he announced the closing of the lunch-room (G. 118).

[20] Mr. Schmid did not know who called the police and testified that his secretary and cashier had instructions to call the store detective in case of disturbances (G. 112).

[21] Apparently at about the time of the arrest, Police Lieutenant Purvis approached Mr. Schmid and stated that "someone called us that you had two people in here that were trying to be served * * *" (G. 112). Schmid pointed to petitioners (G. 112).

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charged petitioners with trespass after warning (G. 109).

(iii) *Parker* and *West*.—Petitioners entered Newberry's, a variety store open to the general public (G. 158, 165). There are two lunch counters in Newberry's for white customers—one on the first floor where these "sit-ins" occurred and one in the basement (G. 163). There is a Negro lunch counter on the fourth floor which has a "for colored only" sign (G. 163, 166).

At least one of the petitioners made purchases of paper and books (G. 170). They then sat at the lunch counter (G. 158–159). No sign at the lunch counter indicated that it was reserved for whites (G. 166, 171). When Mrs. Gibbs, the store detective, saw the petitioners, she (G. 162):

> * * * went over to the lunch counter * * * and identified myself and told them that they would have to leave, they couldn't be served there, but if they would go to the fourth floor we have a snack bar for colored there and they would be served on the fourth floor.

Assistant Store Manager Stallings also spoke with petitioners (G. 164):

> Well I asked them, I said, "You know you can't do this." I said, "We have a lunch counter up on the fourth floor for colored people only. We would appreciate it if you would go up there."

Mr. Stallings did not call the police, did not make a complaint to the police, and did not know whether

anybody else did [22] (G. 165). Police officer Myers was directed by a radio call from police headquarters to proceed to Newberry's (G. 158–159). Myers understood that a fellow officer had received a complaint from a Mr. Stallings, whose capacity at the store—or even whether he was an employee of Newberry's—Myers did not know (G. 160–161). At Newberry's, he encountered something "out of the ordinary," *viz.*, "[t]wo colored males were sitting at the lunch counter" (G. 158). Myers did not speak with petitioners nor did he witness a conversation among petitioners and any store employee (G. 159). Nevertheless, Myers arrested petitioners for trespass after warning.[23]

(iv) *Sanders* and *Westmoreland*.—Petitioners entered the Kress dime store in Birmingham, a general department store soliciting the trade of the general public (G. 214–215). It has no food service facilities for Negroes (G. 215), who are, however, invited to buy food and bakery items to carry out (G. 218). White and Negroes purchase from the same counters at other departments (G. 216).

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[22] Stallings, when asked "Did any other official at Newberry's call the police?," replied: "Someone, now I don't remember who this person was, but someone said to me that we called the police. I don't know who it was. I don't remember that" (G. 165).

[23] Petitioner West testified that when officer Myers arrived on the scene he began to motion white people away from the lunch counter but all of them did not leave (G. 172). "After he started motioning the white people away," West stated, "we started to get up and when we started to get up one got me in the back or somewhere in behind. * * * After I saw him motioning other people up I said, 'Let's go.' And we started to get up" (G. 172).

After petitioners sat down at a bay in the lunch counter, Kress' lunch counter manager told them "we couldn't serve them and they would have to leave" (G. 211). After the manager turned out the lights in the bay in which petitioners were sitting, petitioners moved to another (G. 211). The manager then closed down all the bays and turned out all the lights in the bays (G. 212).

Officer Caldwell, upon receiving a call to go to Kress' store, went to the basement and observed that the lunchroom was closed and "two black males" were "sitting there" (G. 209). The manager then informed the policeman, in the presence of petitioners, that "they couldn't be served and he had turned the lights out and closed the counter" (G. 209).[24] Two policemen entered the bay where petitioners were seated and twice asked them to get up (G. 212). After additional policemen entered, officer Caldwell arrested petitioners, although no one had asked him to do so (G. 209, 210), and the officers escorted petitioners from the store (G. 212).[25]

(v) *Walker* and *Willis*.—Petitioner Walker entered Woolworth's store to purchase handkerchiefs and a birthday gift for a friend (G. 255). Petitioner Willis purchased various non-food items (G. 255).

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[24] The officer did not hear anyone tell petitioners to leave the counter (G. 210). The counter manager had not called the police, requested an arrest or signed a complaint. Nor did the store manager do any of these things in the counter manager's presence (G. 213–214).

[25] A woman already seated at the counter remained after the "closing" and, so far as the counter manager knew, was not arrested (G. 217–218).

They were not refused service at any non-food counter (G. 257–258), and Walker testified that he "really expected service" at the lunch counter because he "had been served prior to coming to the [lunch] counter" (G. 259).

Petitioners proceeded to the lunch counter and sat down (G. 255). There were no signs indicating that the lunch counter was reserved for whites (G. 257). A waitress said to petitioner, "I'm sorry I can't serve you," but they remained seated at the counter (G. 256).

Two police officers arrived in response to a call from the Birmingham police radio (G. 252). Mrs. Evans, the manager of the lunch counter, informed one officer that "she had told the boys to leave, that the place was closed, and the second time she directed her conversation to the defendants and told them it was closed and they would have to leave, she would not serve them" (G. 252–253).[26] Officer Casey testified that no one directly instructed the police to arrest petitioners (G. 253–254), but that he understood Mrs. Evans' "complaint" that "she wanted the boys out of the store" as a request to remove them (G. 253). When asked "did you take it upon yourself to make these arrests," officer Casey replied: "I did under authority of the City of Birmingham" (G. 253).

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[26] This was the testimony of police officer Casey. Petitioner Walker, on the other hand, testified that no one connected with the store management had ever asked petitioners to leave, and that he did not see Mrs. Evans at the store at the time of the incident (G. 256).

Some white customers were ordered to leave the counter, and one was forced to do so by the police but was not arrested (G. 256). Finally a policeman "asked [petitioners] to leave," saying, "Let's go," and informed them that they were under arrest (G. 257). Officer Casey testified that at the time of arrest or shortly thereafter he informed petitioners that they had been arrested for trespass after warning (G. 254).

The complaint against each of the ten petitioners charged that he or she "did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as * * * [the store in question] after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944" (G. 2–3, 73–74, 93, 129, 145, 183, 195–196, 225, 237, 267). Petitioners were convicted in the Recorder's Court of the City of Birmingham. On appeal, they then received successive trials *de novo* in the Circuit Court of Jefferson County with the same judge, prosecutor and defense counsel.

At the first trial (*Gober* and *Davis*), petitioners tried to question a store official concerning the segregation ordinance of the City of Birmingham (Section 369 of the City Code of Birmingham) (G. 24–25):

> Mr. HALL [counsel for petitioners]. * * * It is our theory of this case it is one based simply on the City's segregation ordinance and Mr. Gottlinger, Mr. Pizitz, the police officers and everybody involved acted simply because of the

segregation law and not because it was Pizitz policy.

* * * * *

Mr. Hall. As I understand it it is the theory of the City's case, it is trespass after warning. Our contention is that that is not a fact at all, it is simply an attempt to enforce the segregation ordinance and we are attempting to bring it out.

The Court. Does the complaint cite some statute?

Mr. Hall. Trespass after warning. If we went only on the complaint it would seem that some private property has been abused by these defendants and that the owner of this property has instituted this prosecution. From the witness' answers it doesn't seem to be the case. It seems it is predicated on the segregation ordinance of the City of Birmingham rather than on the trespass. So what we are trying to bring out is whether or not the acts of Pizitz were based on the segregation ordinance or something that has to do with trespass on the property.

The court refused to permit the store official to be interrogated about his knowledge of the law, on the ground that the reason that the store excluded petitioners was immaterial (G. 25–26). During the *Parker* and *West* trial, petitioners' counsel likewise attempted to establish that petitioners were arrested because of the segregation policies of the City of Birmingham and not because of any policy of the store (G. 166–168). The court again ruled that this line of inquiry was not "competent" (G. 168).

Petitioners were again adjudged guilty in the Circuit Court and, in a common sentencing proceeding, were fined $100 and given thirty days' hard labor, with additional time for failure to pay the fine and court costs[27] (G. 10–11, 82, 101–102, 137–138, 153, 188, 203–204, 230, 245–246, 272). The Alabama Court of Appeals, affirming the conviction, wrote an opinion for the first case, *Gober* v. *State of Alabama,* and affirmed all others in brief *per curiam* orders citing *Gober* (G. 57–64, 88, 124, 144, 178, 194, 220, 236, 262, 278). In its opinion in *Gober,* the Court of Appeals stated that 'there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property" (G. 63). The court noted that petitioners were licensees and entered the premises by implied invitation and that, under such circumstances, the owners of the premises had the right to place limitations as they saw fit (G. 63). "It is fundamental," the court held, "and requires no citation of authority, the grantor of a license, which has not become coupled with an interest, may revoke the license at will" (G. 64). The Supreme Court of Alabama denied certiorari in all the cases by identical orders (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278).

[27] For example, petitioner Gober was sentenced to 52 days of hard labor for failure to pay his $100 fine and the $5 costs accrued in the Recorder's Court, and to an additional 60 days of hard labor for failure to pay the costs accrued in the Circuit Court. The State of Alabama also was authorized to recover from Gober the costs expended for feeding Gober while he was in jail (G. 11; see also G. 82, 101–102, 137–138, 153, 188, 203–204, 230, 245–246, 272).

4. SHUTTLESWORTH V. CITY OF BIRMINGHAM, NO. 67

a. Statutes involved.—Petitioners were convicted of violating Section 824 of the General City Code of Birmingham, Alabama (1944). Section 824 provides:

> It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor.

Sections 369 and 1436 of the Birmingham code, which are also involved, are set forth above at page 22.

b. The Facts.[28]—The record shows that James Gober (one of the petitioners in the *Gober* case (see *supra*, pp. 22–24) went to petitioner Shuttlesworth's home on March 30, 1960 (S. 27–28). Shuttlesworth, his wife, several students from Daniel Payne College, and petitioner Billups, who had driven one of the students to Shuttlesworth's home, were present (S. 28, 31). Petitioner Shuttlesworth "asked for volunteers to participate in the sit down demonstrations" (S. 29). A "list," not otherwise described, was prepared (S. 30). One student "volunteered to go to Pizitz [a department store] at 10:30 [a.m.] [the next day] and take part in the sit down demonstrations" (S. 31). Shuttlesworth "didn't say that he would furnish Counsel but told him or made the announcement at that time that he would get them out of jail" (S. 31–32).

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[28] The record of the trial court proceedings in this case consists largely of testimony of a city detective in the Circuit Court of Jefferson County describing the evidence adduced at an earlier trial of petitioner Shuttlesworth for the offense in the city recorder's court. Objections were regularly made to this testimony by the defendants on hearsay grounds (see, *e.g.*, S. 24–25).

Gober and other students present at the meeting did participate in a "sit-in" demonstration, not otherwise described, on the next day, March 31, 1960 (S. 33).

Petitioners Shuttlesworth and Billups were charged with violating Section 824 of the Code of Birmingham, *supra,* by inciting or aiding or abetting "another person to go or remain on the premises of another after being warned not to do so," in violation of Section 1436 of the Birmingham Code, *supra* (S. 2, 53). They were convicted by the city recorder's court. On appeal to the Circuit Court of Jefferson County, they were separately tried *de novo.* Petitioners Shuttlesworth and Billups were again convicted by the court sitting without a jury, and sentenced, respectively, to 180 days hard labor and a $100 fine, and 30 days' hard labor and a $25 fine (S. 40).

The convictions were affirmed by the Court of Appeals of Alabama. The court stated, in the *Shuttlesworth* case, that "'[e]veryone who incites any person to commit a crime is guilty of a common law misdemeanor, even though the crime is not committed'" (S. 44). It also held (S. 44):

> There is no question of the restriction of any right of free speech or other assimilated right derived from the Fourteenth Amendment, since the appellant counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premises presumably for an indefinite period of time. There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

In the *Billups* case, the Court of Appeals simply adopted the findings of fact and the legal conclusions set forth in the *Shuttlesworth* case (S. 67). On September 25, 1961, the Supreme Court of Alabama denied writs of certiorari in both cases, and on November 16, 1961, rehearings were denied (S. 46, 69).

5. PETERSON V. CITY OF GREENVILLE, NO. 71

a. Statutes Involved.—Section 31-8, Code of Greenville, South Carolina, 1953, as amended in 1958, provides:

> It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:
>
> (a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;
>
> (b) Separate tables, counters or booths;
>
> (c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;
>
> (d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;
>
> (e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races.

Petitioners were convicted of violating Section 16–388, Code of Laws of South Carolina, 1952, as amended in 1960, which provides:

> Any person:
>
> (1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or
>
> (2) who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,
>
> Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

b. The Facts.—At about 11:00 a.m. on August 9, 1960, petitioners, ten Negro students, took seats at the lunch counter at the Kress department store in Greenville, South Carolina, and requested service (P. 1, 19, 36). The Kress store in Greenville is open to the general public; it has fifteen to twenty departments and sells over 10,000 items (P. 21). Negroes and whites are invited to purchase and are served alike, except that Negroes are not served at the lunch counter (P. 21).

When petitioners requested service at the lunch counter, they were told by a Kress employee, "I'm sorry, we don't serve Negroes" (P. 19, 36). Petitioners refused to leave, and G. W. West, the Kress

manager, directed that the police be called (P. 22).[29]

Captain Bramlette of the Greenville Police Department received the call to proceed to the Kress store (P. 7). He was told that there were young colored boys and girls seated at the lunch counter (P. 10). Captain Bramlette testified that he did not know the origin of the telephone call (P. 7, 10). When Captain Bramlette, with several city policemen, arrived at the store, he found two agents of the State Law Enforcement Division already present at the lunch counter (P. 7).[30] In the presence of the police officers, the lunch counter lights were turned off and manager West requested "everybody to leave, that the lunch counter was closed" (P. 19, 15).[31] At petitioners' trial, their counsel was denied permission to ascertain whether this request followed arrangement or agreement with the police (P. 23, 24–25). After

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[29] Doris Wright, one of the petitioners, testified that on an earlier occasion she had spoken to the Kress manager about the stores' policy of lunch counter segregation and was assured that charges would not be pressed against Negroes who sought service (P. 38).

[30] The South Carolina Law Enforcement Division was organized to assist local law enforcement officers. Officer Hillyer of the Division, present at the time of the incident, testified that his immediate superior is Chief J. P. Strom, who is directly under the authority of the Governor of South Carolina (P. 43).

[31] Petitioner Wright testified that the request to leave was made by the police and not by Mr. West (P. 37). She denied that Mr. West asked her or any of the other petitioners to leave (P. 41). When asked, "Of course, you are not in position to say whether or not Mr. West may have made a request to some of the other nine?" she replied, "Yes, I am, Mr. West, come from the back of the store, at the time we were being arrested and were told that the lunch counter was closed" (P. 41).

about five minutes,[32] during which petitioners had made no attempt to leave the lunch counter, Captain Bramlette placed them under arrest for trespassing (P. 19).[33] Store manager West did not request that petitioners be arrested (P. 16, 24).

White persons were seated at the counter when the announcement to close was made but none were arrested (P. 19). Mr. West testified that, when the lights went out, the white customers departed (P. 19). But a white customer testified that, at the time of the arrests, some white persons were still seated at the counter (P. 30–31). As soon as petitioners were removed by the police, the lunch counter was reopened (P. 23).

Manager West testified that he closed the counter because of local custom and because of the Greenville city ordinance requiring racial segregation in eating facilities (P. 23):

> Q. Mr. West, why did you order your lunch counter closed?
>
> A. It's contrary to local custom and it's also the ordinance that has been discussed.
>
> Q. Do I understand then further, that you are saying that the presence of Negroes at your lunch counter was contrary to customs?
>
> A. Yes, sir.
>
> Q. And that is why you closed your lunch counter?

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[32] There is some conflict in the record regarding the time lapse between the announcement that the counter was closed and the arrests (see P. 22, 37, 38, 45).

[33] Four other Negroes were also arrested but their cases were disposed of by the juvenile authorities (P. 7).

A. Yes, sir, that's right.[34]

The record is conflicting as to whether Captain Bramlette thought he was acting under the Greenville segregation ordinance or the State trespass law. At one point, the Captain testified that he did not have the city ordinance in mind when he went to Kress but was thinking of the recently passed State trespass statute (P. 11). When asked however, why he arrested petitioners, he said (P. 15):

> A. Under the State Law just passed by the Governor relative to sit-down lunch counters in Greenville, I enforced this order.
>
> Q. But the State Law that just passed and signed by the Governor in May doesn't mention anything about Negroes sitting at lunch counters, does it?
>
> A. It mentions sit-ins.

However, after refreshing his recollection, the Captain conceded that the new State law did not mention sit-ins (P. 15). He further testified as follows (P. 16–17):

> Q. Did the manager of Kress', did he ask you to place these defendants under arrest, Captain Bramlette?
>
> A. He did not.
>
> Q. He did not?
>
> A. No.
>
> Q. Then why did you place them under arrest?
>
> A. Because we have an ordinance against it.
>
> Q. An ordinance?

[34] Mr. West testified (P. 21) that the policy of following local custom was prescribed by Kress' headquarters.

A. That's right.

Q. But you just now testified that you did not have the ordinance in mind when you went over there?

A. State law in mind when I went up there.

Q. And that isn't the ordinance of the City of Greenville, is it?

A. This supersedes the order for the City of Greenville.

Q. In other words, you believe you referred to an ordinance, but I believe you had the State statute in mind?

A. You asked me have I, did I have knowledge of the City ordinance in mind when I went up there and I answered I did not have it particularly in my mind, I said I had the State ordinance in my mind.

Q. I see and so far this City ordinance which requires separation of the races in restaurants, you at no time had it in mind as you went about answering the call to Kress and placing these people under arrest?

A. In my opinion the State law was passed recently supersedes our City ordinance.[35]

Petitioners were tried and convicted in the Recorder's Court of Greenville before the City Recorder, sitting without a jury, of violation of the South Carolina trespass law and sentenced to pay a fine of one hundred dollars or serve thirty days in the city jail (P. 47). Petitioners appealed to the Greenville County Court, and their appeal was dismissed on

[35] Although the trial judge appears to have denied petitioners' motion to make the Greenville segregation ordinance a part of the record (P. 46–47), it nevertheless has been incorporated into the record (P. 49).

March 17, 1961 (P. 50). That court noted that the trespass statute was merely a reenactment of the common law which permits a property owner to order any person from his premises whether they be an invitee or an uninvited person and that the constitutionality of the statute was unquestioned (P. 50–51). The court rejected petitioners' contention that they had a right to be served (P. 52).

On November 10, 1961, the Supreme Court of South Carolina affirmed the judgment and sentences (P. 55). It held that the operator of a privately owned business may accept some customers and reject others on purely personal grounds, in the absence of a statute to the contrary (P. 58). The court also held that there was nothing in the record to substantiate a claim that petitioners were actually prosecuted under the Greenville segregation ordinance (P. 59). The Supreme Court denied rehearing on November 30, 1961 (P. 62).

ARGUMENT

INTRODUCTION AND SUMMARY

We believe it important at the outset to define, and if possible limit, the issue in these cases.

The Fourteenth Amendment provides:

> * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

In the *Civil Rights Cases*, 109 U.S. 3, decided shortly after the adoption of the Fourteenth Amendment, this Court held that the Amendment drew a fundamental distinction between a State's denial of

equal protection of the laws and discrimination by private individuals, however odious. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment" (*id.*, p. 11).

For a century, this basic postulate has been consistently applied in the courts. This brief does not question its validity. On the one hand, a State cannot constitutionally prohibit association between Negroes and whites, be it in a public restaurant or elsewhere. On the other hand, to cite an example, if a private landowner should invite all of his neighbors to use his swimming pool at will and then request one of the invitees to leave because of his race, creed or color, the decision would be private and, however unpraiseworthy, not unconstitutional. Furthermore, we take it that there would be no denial of equal protection if the State made its police and legal remedies available to the owner of the swimming pool against any person who came or remained upon his property over his objection. For, in a civilized community, where legal remedies have been substituted for force, private choice necessarily depends upon the support of sovereign sanctions. In such a case, the law would be color-blind and it could not be fairly said, we think, that the State had denied anyone the equal protection of its laws.

With respect to these "sit-in" cases it has been argued most broadly that the requisite State action is to be found in the arrests by the police, the prosecutions and the convictions, and that since discrimi-

nation against Negroes resulted from this State action, it violates the constitutional guarantee of equal protection of the laws. Cf. Henkin, *Shelley* v. *Kraemer: Notes for a Revised Opinion,* 110 U. of Pa. L. Rev. 473. Our example of the private residence and swimming pool is to be distinguished (the argument runs) upon the ground that, although that case too would involve State action and thus raise a federal constitutional question if there was an arrest and prosecution, nevertheless, the owner's right of privacy should outweigh the neighbor's claim to be free from racial discrimination. Against this, the States will no doubt argue that the two cases are alike because the State does not deny equal protection of the law when it indiscriminately offers to support the decision of the private landowner without regard to the landowner's reasons.

We believe that this broad issue need not, and should not, be decided in the cases at bar. We express no opinion upon it. We assume *arguendo* that in the absence of other grounds for holding the State responsible the principle invoked by the States is applicable to uninvited entrants upon business property, where the business is neither subject to a legal duty to serve the public (as in the case of inns and common carriers) nor owned or managed by one exercising sovereign functions. In our view, however, the principle is not applicable to the present cases.

One significant difference is that these cases do not involve in any substantial sense the landowner's privilege of deciding whom he will bar from his

premises and whom he will invite upon them as social guests or business visitors. In these cases the Negroes were invited into the store and were lawfully on the premises. In the *Lombard* case, for example, McCrory's Five and Ten Cent Store caters to the general public, both whites and colored, and even at the lunch counter restricted to white patronage there was no sign indicating the restriction. The situation was substantially the same in *Peterson, Gober* and *Shuttlesworth*. The all-white lunch room in *Avent* was expressly restricted to "invited guests," which perhaps impliedly excluded the petitioners in that case, but all other portions of the store were open to Negroes and their patronage was solicited without discrimination. The only real restriction, therefore, was a policy of refusing to allow white and colored to break bread together. Although this restriction can be cast in the language of the law of trespass by saying that the owner may revoke the consent to enter, the terminology cannot conceal the fact that the sole reason for revocation was petitioners' refusal to accept a stigma of social inferiority. While this circumstance may not directly bear upon the question of the States' responsibility, it plainly shows that no substantial claim to constitutional rights in private property is involved in these cases. Cf. *Marsh* v. *Alabama*, 326 U.S. 501, 505–507.[36]

[36] Also, Mr. Justice Frankfurter, concurring, said "And similarly the technical distinctions on which a finding of 'trespass' so often depends are often too tenuous to control [a] decision regarding the scope of the vital liberties guaranteed by the Constitution." 326 U.S. at 511. Cf. *Shelley* v. *Kraemer*, 334 U.S. 1, 22; *Barrows* v. *Jackson*, 346 U.S. 249, 260.

Still more important in the cases at bar, the Stat
which instituted the prosecutions, share the respor
bility for the invidious discrimination, so that t
State denial of equal protection does not depend up
the arrests and prosecution alone. In the *Arc*
Gober and *Peterson* cases, municipal ordinances
quired racial segregation in public eating places.
the *Shuttlesworth* case, petitioners were convicted
aiding and abetting Negroes to sit in lunch count
reserved for whites in a city where an ordinance
quired segregation in restaurants. In t*he* *Lomba*
case, the State's laws and policies, effectively and pe
sistently implemented throughout the community, h
a similar effect, albeit there was no ordinance
terms requiring the exclusion of Negroes from t
establishment in question.

Accordingly, we submit that the only question n
requiring decision is whether, judged against t
background of the owner's willingness to serve N
groes in other parts of the stores, the States' influen
upon the owner's decision to discriminate in servi
food, through explicit segregation ordinances in fo
cases and through a general policy of promoting
cial segregation in the fifth, was sufficient on th
records to make the States' activities, taken as a whe
a denial of equal protection of the laws. If so, t
resulting convictions must be reversed.

It is one thing for the State to enforce, through t
laws of trespass, exclusionary practices which r
simply upon individual preference, caprice
prejudice. It is quite another for the State, exer

ing as it does immeasurable influence over individual behavior, to induce racial segregation and then proceed to implement the acts of exclusion which it has brought about. If the State, by its laws, actions, and policies, causes individual acts of discrimination in the conduct of a business open to the public at large, the same State, we believe, cannot be heard to say that it is merely enforcing, in even-handed fashion, the private and unfettered decisions of the citizen.

To sustain the judgments of conviction in the instant cases in the face of the segregation ordinances and official policies, the Court, we believe, would be obliged, at a minimum, to find (1) that the acts of discrimination were shown not to be a result of the State's laws and policies or of the actions of State officials and (2) that the petitioners, when ordered to leave the premises in question, were on notice that the proprietor was acting to assert his own rights, rather than in obedience to the State's unconstitutional command. In these cases, neither finding can be made. For aught that appears, the State, in each instance, laid the foundation for the criminal conviction by its own mandates of segregation.

I

THE CONVICTIONS OF THE PETITIONERS IN *Avent, Gober, Shuttlesworth* AND *Peterson* VIOLATE THE FOURTEENTH AMENDMENT BECAUSE IT MUST BE CONCLUDED THAT THE FORCE OF MUNICIPAL LAWS CAUSED THE PROPRIETORS TO DISCRIMINATE

While the petitioners in *Avent, Gober,* and *Peterson* were convicted of trespassing for refusing to leave racially segregated lunch counters, these cases

cannot be divorced from the fact that the allegedly criminal acts occurred in communities which had ordinances affirmatively requiring racial segregation at establishments where food is served. (The *Shuttlesworth* case, involving a charge of aiding and abetting the violation of Alabama's criminal trespass statute, turns on the same considerations which govern the *Gober* case.) The City of Durham, North Carolina (see *supra*, pp. 6–7),[37] the City of Birmingham, Alabama (see *supra*, p. 22), and the City of Greenville, South Carolina (see *supra*, pp. 35–36), all had ordi-

[37] In the *Gober* case, the Alabama Supreme Court held that the Birmingham ordinance was not properly pleaded and therefore was not before the court on appeal. This reasoning is plainly insubstantial, since it is well established that the Alabama courts can take judicial notice of municipal ordinances. See 7 Code of Alabama (1940), § 429(1); *Shell Oil* v. *Edwards*, 263 Ala. 4, 81 So. 2d 535; *Smiley* v. *City of Birmingham*, 255 Ala. 604, 605, 52 So. 2d 710; *Monk* v. *Birmingham*, 87 F. Supp. 538 (N.D. Ala.), affirmed, 185 F. 2d 859 (C.A. 5), certiorari denied, 341 U.S. 940. Therefore, the ordinance was properly before the Alabama courts and may be considered by this Court.

We recognize that the existence of the Durham segregation ordinance was not called to the attention of the courts below and that no argument based on that ordinance was advanced in the petition for certiorari in the *Avent* case. Nevertheless, on occasion, this Court has decided cases on a ground not raised below. See, *e.g.*, *Terminiello* v. *Chicago*, 337 U.S. 1. This practice is particularly appropriate where it furthers this Court's historic refusal to adjudicate far-reaching constitutional questions except where such adjudication is absolutely necessary to the decision. See, *e.g.*, the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345–348. Accordingly, should this Court conclude that the existence of the segregation ordinances in

nances forbidding eating establishments from serving whites and Negroes on a nonsegregated basis. We submit that the decision of restaurant owners to discriminate under the compulsion of these ordinances constitutes State action in violation of the Fourteenth Amendment. From that, it necessarily follows that the arrest and conviction of persons for refusing to obey this decision to discriminate likewise violates the command of the Constitution.

Gober and *Peterson* requires reversal of the convictions in these cases, we believe that a similar result should follow in *Avent*. Such a reversal in *Avent* would avoid consideration of any new constitutional issues not already decided in *Gober* and *Peterson*.

If this Court should conclude that it ought not take judicial notice of the Durham ordinance in deciding the case on the merits and that the constitutional issues raised, absent the ordinance, go substantially beyond anything required to be decided in the companion cases, it may wish to consider two other dispositions of the *Avent* case. One would be to remand the case to the Supreme Court of North Carolina for further consideration in the light of the decisions in any cases in which the segregation ordinances were given decisive significance. That court's rule with respect to judicial notice (see *Fulghum* v. *Town of Selma*, 238 N.C. 100, 76 S.E. 2d 368, 371; *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. 2d 295, 300) might properly be affected by awareness of possible constitutional implications. And this Court has authority to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. 2106. The other course would be to consider whether the writ was providently granted in the *Avent* case. The well-established practice of refusing to decide difficult constitutional issues upon an inadequate record or in cases that do not require their decision would seem equally applicable to cases in which the constitutional issue is raised only because one of the parties failed to take advantage of another available defense. Cf. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70.

A. A MUNICIPAL ORDINANCE WHICH REQUIRES RACIAL SEGREGATION IN RESTAURANTS VIOLATES THE FOURTEENTH AMENDMENT

The municipal ordinances involved in these cases are clearly unconstitutional. It is a fundamental principle of our constitutional system that the Fourteenth Amendment prohibits state-sanctioned racial segregation. This principle was recently applied to restaurants in *Turner* v. *City of Memphis*, 369 U.S. 350. There, a statute authorized the State Division of Hotel and Restaurant Inspection of the State Department of Conservation to issue "such rules and regulations * * * as may be necessary pertaining to the safety and/or sanitation of hotels and restaurants * * *" and made violation of such regulations a misdemeanor (*id.* at 351). The resulting regulation provided that "[r]estaurants catering to both white and negro patrons should be arranged so that each race is properly segregated" (*ibid.*). This Court left no doubt that such State-required racial discrimination was unconstitutional, stating (*id.* at 353):

> * * * our decisions have foreclosed any possible contention that such a statute or regulation may stand consistently with the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483; *Mayor & City Council* v. *Dawson*, 350 U.S. 877; *Holmes* v. *City of Atlanta*, 350 U.S. 879; *Gayle* v. *Browder*, 352 U.S. 903; *New Orleans City Park Improvement Assn* v. *Detiege*, 358 U.S. 54. * * *

See also *Bailey* v. *Patterson*, 369 U.S. 31; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Morgan* v. *Virginia*, 328 U.S. 373; *Baldwin* v. *Morgan*, 287 F. 2d 750 (C.A. 5).

B. THE STATE IS RESPONSIBLE FOR THE DECISION OF THE OWNERS OF A RESTAURANT TO DISCRIMINATE ON THE BASIS OF RACE WHEN THIS DECISION IS COMPELLED BY STATE LAW

If the owner of an establishment requests Negroes to leave a lunch counter reserved for whites because a State law requires the owner to maintain segregation, the prosecution of Negroes for criminal trespass for refusing to leave would be an implementation of the discriminatory State statute and would therefore violate the equal protection clause of the Fourteenth Amendment. While this Court has apparently never had occasion to pass directly upon the question, the lower courts have so held. Thus, in *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847, the Court of Appeals for the Fourth Circuit indicated that "actions * * * performed in obedience to some positive provision of state law" acquire the coloration of the State and are governed by the broad egalitarian requirements of the Fourteenth Amendment. In *Flemming* v. *South Carolina Electric and Gas Co.*, 224 F. 2d 752, the Fourth Circuit held that the racial segregation of passengers by a bus company, as required by State law, constituted action under color of State law. Similarly, the Court of Appeals for the Fifth Circuit has held that "[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state." *Baldwin* v. *Morgan*, 287 F. 2d 750, 755 (C.A. 5). It declared (*id.* at 756):

> * * * the State may not use race or color as the basis for distinction. It may not do so by direct action *or through the medium of others*

> *who are under State compulsion to do so.* * * *
> (Emphasis added.)

See also the earlier *Baldwin* v. *Morgan* case, 251 F. 2d 780, 789–790 (C.A. 5); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (C.A. 5).[38]

The rule enunciated in the above decisions, we believe, is clearly correct. A person who engages in racial discrimination under influence of the State's coercive authority is in no sense acting independently. Rather, he is acting in compliance with the will of the State, and the effect of his action is to carry out the State's policy of discrimination. Consequently, the discriminatory action, while performed by a private person, is a reflection of the State's law and policy. The State has "insinuated itself" into the private decision and "place[d] its authority behind discriminatory treatment based solely on color * * *" in the most forceful manner available to it, by the compulsion of its penal laws. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725, 727.

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[38] And see *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 845, 846 (C.A. D.C.) (Judges Bazelon and Edgerton dissenting):

"If a state statute affirmatively required restaurant owners to segregate their facilities or exclude Negro patrons, conduct of the restaurant owners caused solely by the compulsion of such a statute would be state action and would give rise to a claim for relief under [42 U.S.C.] § 1983. * * * When otherwise private persons or institutions are required by law to enforce the declared policy of the state against others, their enforcement of that policy is state action no less than would be enforcement of that policy by a uniformed officer."

The majority opinion in *Hot Shoppes* did not reach this question.

Indeed, if actions compelled by statute are not considered State action, decisions of this Court proscribing State-imposed racial segregation (see *supra*, p. 48) may be largely circumvented. For the result is that State laws compelling private persons or organizations to discriminate are enforced through parallel statutes—like the trespass and criminal mischief statutes involved here. It may be argued that no businessman is bound to discriminate because, if he disobeys a State law which commands discrimination, he can challenge the constitutionality of the statute under which he has been convicted—if need be, in this Court. But a criminal law, with the power of the State behind it, has, until it is repealed, a powerful effect of its own. Ordinary citizens do not know that a particular law is not enforced or is unconstitutional, and, even if they know, they do not lightly disregard it. In any event, regardless of the number of people who act under compulsion of a State segregation statute which is unconstitutional and therefore unenforceable, certainly in the case of those who do respond to the compulsion the consequence is an implementation of the statutory command. The use of the State's criminal law to arrest and convict Negroes for activities which, except for unconstitutional State segregation statutes, would be entirely legal—because the restaurateur would not discriminate—is surely unconstitutional.

2. We have shown that, if a restaurateur excludes Negroes because of a State statute, the State cannot convict Negroes for trespass for entering the restau-

rant. In none of these cases, we recognize, does the record contain an express and specific affirmative showing that the coercive force of the segregation ordinance was the sole reason for the proprietor's refusal to serve the various petitioners. In *Peterson* the proprietor testified that he refused service because of local custom *and* the segregation ordinance of Greenville. In *Avent* the ordinance is not mentioned in the record, but the manager acted in accordance with local custom and for reasons of "public safety." The *Gober* case presents five pairs of convictions. Petioners Gober and Davis were excluded because the proprietor felt that it would be against the law to serve them. The records in the four other trials in the *Gober* case do not record the motivation of the various proprietors.[39] In *Shuttlesworth,* the petitioners were convicted of aiding and abetting the violations of the trespass statute involved in the *Gober* case. Under Alabama law, as stated by the Alabama Court of Appeals in this case, the validity

[39] In the *Gober-Davis* trial, petitioners' attempt to secure further evidence concerning the relationship of the ordinance and the decision to discriminate was foreclosed by the rulings of the trial court that this line of inquiry was incompetent (see the Statement, *supra*, pp. 29–30). Since *Gober-Davis* was the first of a series of five trials before the same state trial judge, further efforts in the four later cases to raise the same issue would have been futile, as is shown by the court's ruling in *Parker-West* that a similar line of inquiry was impermissible. Thus, while no effort was made in the *Hutchinson-King, Sanders-Westmoreland,* or *Walker-Willis* trials to raise an issue concerning the segregation ordinance, it is fair to say that all the petitioners in *Gober* were denied an opportunity to show that the restaurateurs' decisions to discriminate were based on the Birmingham ordinance.

of the convictions depends on whether they were inciting persons to commit a crime. There is no evidence in the *Shuttlesworth* record as to the motivations of the proprietors of the establishments where the "sitting-in" occurred.

Upon each of these records the only permissible inference is that the local ordinance was such a substantial factor in the proprietor's decision that the State must share in the responsibility for the discrimination to the same extent as if the record showed that the decision of the restaurateurs to discriminate was based solely upon State law. It is not necessary that the discrimination be solely the result of the State's activities. It is enough that the State in any of its manifestations has become involved in the discrimination. See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722. See also pp. 59–63 *infra*.

We base our submission that the only permissible inference upon these records is one of substantial State responsibility for the proprietor's discrimination upon three lines of reasoning.

First, where State law requires racial segregation in all eating places and the proprietors uniformly comply, the average individual proprietor would never reach the question whether he would discriminate if left to a judgment uninfluenced by the State; and this seems true whether the owner is conscious or unconscious of the reasons for his conduct. The normal inference to be drawn from the existence of the ordinance, therefore, is that it caused the discrimination, and the State would then have to overcome the infer-

ence by showing that the decisions of the proprietors were wholly uninfluenced by the compulsion of an existing State law.

Second, to the extent that the records in these cases are unclear as to the motivation of the proprietors, the States had the burden of removing the ambiguity because the States themselves created it. It is a familiar principle of general applicability in our law that the party responsible for a wrong must "disentangle the consequences for which it was chargeable" or bear the responsibility for the whole. *National Labor Relations Board* v. *Remington Rand Inc.,* 94 F. 2d 862, 872. The question whether the restaurateurs were moved to act as they did because of the coercive effect of the segregation statutes would not exist except for the fact that the States passed and retained statutes which compel racial segregation and therefore violate the Fourteenth Amendment. It is clear, as we have seen, that if the proprietor discriminates as a result of the compulsion of the State, this constitutes State action. On the face of it, the decisions of the restaurateurs to discriminate were made under compulsion of explicit State statutes. Assuming that a State would be heard to deny the coercive effect of its own ordinance, there is no showing in any of these cases that the State did not cause the exclusionary act of the proprietor. In each instance, therefore, the State has failed to establish an element essential to the constitutionality of the conviction.

Third, even if the States had shown that the proprietor's decision to discriminate was not caused by the compulsion of the municipal ordinances, these

convictions would have to be deemed invalid because it was not also made to appear that the petitioners knew that the proprietor's decision was a purely private choice. Where discrimination appears on its face to be invalid under the Fourteenth Amendment because it is compelled by a State law, Negroes should not be required to investigate the true motive of the restaurateur before entering the premises. In *Boynton* v. *Virginia,* 364 U.S. 454, this Court held that the Interstate Commerce Act forbids racial segregation of a restaurant in a bus terminal. A contention was made that there was no proof that the bus company owned or controlled the bus terminal or restaurant in it. The Court answered that "where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers * * *, an interstate passenger need not inquire into documents of title or contractual arrangements in order to determine whether he has a right to be served without discrimination." *Id.* at 462–464. Thus, the Court held in *Boynton* that a Negro who is being discriminated against need not inquire into the precise facts when it appears that the discrimination violates the Interstate Commerce Act. It follows *a fortiori* that where, as in these cases, discrimination against Negroes on its face appears to violate the Fourteenth Amendment, the Negro need not ascertain the motives of the owner at the risk of suffering criminal sanctions.

If Negroes were required to ascertain the actual motives of the proprietors before seeking service at lunch counters or entering lunch rooms, their rights under the Fourteenth Amendment would be seriously abridged. These motives are frequently difficult, if not impossible, to ascertain, at the time the Negro desires service in a particular restaurant, especially when, as in most of these cases, chain stores are involved.[40] The situation is analogous to that in First Amendment cases where this Court has held that the State cannot pass statutes which, because of vagueness, or the burden of proof, or the lack of any requirement of scienter, have the indirect effect of discouraging freedom of speech even though in the particular case no protected right may have been invaded. *E.g., Smith* v. *California,* 361 U.S. 147; *Speiser* v. *Randall,* 357 U.S. 513; *Thornhill* v. *Alabama,* 310 U.S. 88; *Winters* v. *New York,* 333 U.S. 507; *Wieman* v. *Updegraff,* 344 U.S. 183. In these cases, too, the effect of the State convictions is to discourage the assertion of constitutional rights since the petitioners were not given notice of the facts necessary to determine whether their actions were constitutionally protected.

In the present cases it is unnecessary, we think, to go farther and consider whether the presumption that a State law requiring segregation in eating

[40] Negroes, it appears, are invited into these stores, and in other respects their trade is solicited on a non-discriminary basis.

places has played a significant part in the proprietor's decision can be overcome by testimony that the proprietor would have enforced segregation even if there were no current statute or ordinance. It can be argued with considerable force that a private person should not lose a power of choice which is otherwise his merely because the State or municipality has acted in an unconstitutional manner. We would submit, however, if the question had to be decided, that, whatever may be the right of a proprietor to assert in private litigation that his decision to segregate is the result of private choice rather than the State's command, the State cannot justify the prosecution as consistent with the Fourteenth Amendment upon the ground that its command directing segregation had no effective influence upon the proprietor, the police or the public prosecutor. In a criminal prosecution one cannot put the segregation statute or ordinance, the proprietor's decision and the prosecution for trespass in separate compartments. The order to segregate is too inconsistent with freedom of choice and the ways in which its existence may influence proprietors' decisions are too varied and too subtle to permit a State to defend a criminal prosecution which enforces racial segregation, upon the ground that the segregation resulted from private choice, unless the State has actually left both choices entirely open to proprietors.

The segregation ordinances are also related to petitioners' convictions for criminal trespass by another tie. The police normally exercise considerable dis-

cretion in their method of handling citizens' complaints about infractions of minor criminal laws such as the trespass statutes. Prosecutors have and exercise similar latitude in deciding whether to institute criminal proceedings; and the judge has wide discretion in his disposition of the case. A State which has current laws requiring racial segregation in public eating places interjects an official discriminatory bias into all these decisions which is certainly relevant in deciding whether a prosecution for criminal trespass is so closely related to the discriminatory ordinances as to be part and parcel of the same State denial of equal protection of the laws.

II

ALTHOUGH IN THE LOUISIANA CASE THE STATE ADDRESSED NO EXPLICIT STATUTORY COMMAND TO RESTAURATEURS, AS SUCH, TO SEGREGATE THEIR CUSTOMERS, IT APPEARS THAT THE STATE, BY ITS POLICIES AND BY ITS LAWS IN CLOSELY RELATED AREAS, EFFECTIVELY INDUCED THE PROPRIETOR'S ACTS OF DISCRIMINATION. SINCE THE CASE DOES NOT PERMIT A FINDING THAT THE PROPRIETOR WAS MERELY MAKING A PRIVATE DECISION UNINFLUENCED BY OFFICIAL PRESSURE, THE STATE IS CONSTITUTIONALLY FORBIDDEN TO IMPOSE CRIMINAL SANCTIONS WHICH IMPLEMENT THE DISCRIMINATION.

A. The argument just concluded advances the proposition that when a State expresses its policy by issuing a specific statutory command to segregate it bears a heavy responsibility for discriminatory conduct which conforms to the State's requirement and cannot be permitted to compound the injustice by imposing criminal sanctions upon the victims of the

discrimination. The question presented in *Lombard* v. *Louisiana* is whether the same principle governs when the State's segregation policy is not embodied in an explicit statutory directive in terms requiring the proprietor of the particular establishment to discriminate against Negroes, but is, nonetheless, forcibly expressed and plainly evident in legislative declarations, laws in closely related areas, statements of public officials, and a long standing community-wide custom fostered and encouraged by the State.

We submit the same rule applies. For, in the absence of any contrary proof, in the latter case like the former it must be concluded that the exclusion of the Negro is the result of State policy rather than an unfettered individual decision. Notwithstanding the unsupported opinion of the Louisiana Supreme Court to the contrary (L. 146, 147, 148), an examination of the State and City policies and laws, together with the facts disclosed by the record, leads to the conclusion that Louisiana induced the acts of discrimination which support the prosecutions in *Lombard;* hence we submit these convictions are as invalid as those in the other cases.

To illustrate our point, we need go no further than the actual facts. Suppose, if you will, a State which, through its legislature, has proclaimed an overriding State policy of segregation; a State which, in pursuance of this policy, has enacted a panoply of prohibitions designed to inhibit contact between the races; a State which has vigorously and persistently enforced these prohibitions; a State which,

through the acts, conduct and statements of its public officials, has placed continuing stress upon the proposition that segregation is the required way of life; a State which, by the force of law and policy, brought to bear over the course of many decades and still continuing, has established a community-wide custom of segregation reaching virtually into every department of life. Suppose further that, though no specific enactment explicitly requires it, segregation is in fact uniformly practiced in public restaurants, in full conformity with the State's open and declared policies and with its encouragement and support. In these circumstances, does the absence of an express statutory command justify the conclusion that the State's prosecution of Negroes who seek to be served food despite the discriminatory practices followed by the proprietors of such an establishment is neutral and "color-blind"? Or, at least in the absence of a strong showing to the contrary, is one not driven, rather, to the conclusion that the State can not disclaim a measure of responsibility for the discrimination which it now seeks to implement through criminal sanctions?

Common sense requires an affirmative answer. Nor does this result call for the adoption of novel principles of law.

We begin with one certainty. The absence of an explicit statutory command does not foreclose the search for State action. The Fourteenth Amendment is not so narrowly confined. Just as the State acts in many other ways, so the Amendment looks

beyond the formal enactments of the State legislature. It notices State action in the rulings of judges, *Ex Parte Virginia,* 100 U.S. 339; *Shelley* v. *Kraemer,* 334 U.S. 1, in the edicts of governors, *Sterling* v. *Constantin,* 287 U.S. 378; *Cooper* v. *Aaron,* 358 U.S. 1; *Faubus* v. *Aaron,* 361 U.S. 197, affirming 173 F. Supp. 944, and in the decisions of all manner of subordinate local officials. *Virginia* v. *Rives,* 100 U.S. 313, 321; *Yick Wo* v. *Hopkins,* 118 U.S. 356; *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U.S. 278; *Niemotko* v. *Maryland,* 340 U.S. 268; *Pennsylvania* v. *Board of Trusts,* 353 U.S. 230; *Cooper* v. *Aaron, supra.* And, as the cases just cited make plain, discrimination by State officers is no less prohibited because it is accomplished without, or despite, the command of statutory law. See *Monroe* v. *Pape,* 365 U.S. 167, 171–172.

But the Amendment does not reach "official" acts only. The State is not insulated merely because the result is accomplished through persons interposed, however, "private" they may claim to be. The State can no more dictate discrimination in private institutions than it can segregate its own facilities. *Truax* v. *Raich,* 239 U.S. 33; *Buchanan* v. *Warley,* 245 U.S. 60; *Gayle* v. *Browder,* 352 U.S. 903, affirming 142 F. Supp. 707; *State Athletic Commission* v. *Dorsey,* 359 U.S. 533, affirming 168 F. Supp. 149; *Bailey* v. *Patterson,* 369 U.S. 31, 33; *Turner* v. *City of Memphis,* 369 U.S. 350. The constitutional right to equal treatment "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly * * *" *Cooper* v. *Aaron, supra,* 358 U.S. at 17. Nor is it only when the State

explicitly dictates discrimination by others that their conduct "may fairly be said to be that of the States." *Shelly* v. *Kraemer, supra,* 334 U.S. at 13. See *Nixon* v. *Condon,* 286 U.S. 73; *Smith* v. *Allwright,* 321 U.S. 649; *Terry* v. *Adams,* 345 U.S. 461. State "participation", "whether attempted 'ingeniously or ingenuously,' " or "insinuation" in discriminatory activity is just as real when its involvment is "nonobvious." *Cooper* v. *Aaron, supra,* 358 U.S. at 4, 17; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725. Cf. *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451.[41] And, again, it does not matter through what branch of government, or whether formally or informally, the State encourages segregation by others. *Cooper* v. *Aaron, supra,* 358 U.S. at 17; *Terry* v. *Adams, supra,* 345 U.S. at 475 (opinion of Mr. Justice Frankfurter); *Barrows* v. *Jackson,* 346 U.S. 249, 254. As stated by this Court many years ago, "the prohibitions of the Fourteenth Amendment * * * have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes

[41] See, also, *Muir* v. *Louisville Park Theatrical Association,* 347 U.S. 971, reversing and remanding 202 F. 2d 275; *Kerr* v. *Enoch Pratt Free Library of Baltimore City,* 149 F. 2d 212 (C.A. 4); *Department of Conservation & Development* v. *Tate,* 231 F. 2d 615 (C.A. 4); *City of St. Petersburg* v. *Alsup,* 238 F. 2d 830 (C.A. 5); *Derrington* v. *Plummer,* 240 F. 2d 922 (C.A. 5); *City of Greensboro* v. *Simkins,* 246 F. 2d 425 (C.A. 4); *Baldwin* v. *Morgan,* 287 F. 2d 750 (C.A. 5); *Lawrence* v. *Hancock,* 76 F. Supp. 904 (S.D.W.Va.); *Jones* v. *Marva Theatres, Inc.,* 180 F. Supp. 49 (D.Md.); *Coke* v. *City of Atlanta, Ga.,* 184 F. Supp. 579 (N.D.Ga.). And see *Valle* v. *Stengel,* 176 F. 2d 697 (C.A. 3).

that action may be taken." *Ex Parte Virginia, supra,* 100 U.S. at 346–347.

The cases just cited, although they do not resolve the present issue, show the breadth of the concept of State action, which, as Mr. Justice Clark pointed out in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 721–722, has from the day of the *Civil Rights* cases until *Cooper* v. *Aaron* embraced "State action of every kind * * * which denies * * * the equal protection of the laws" (109 U.S. at 11) and also "state participation through any arrangement, management, funds or property" (358 U.S. at 4). So long as the State has meaningfully "place[d] its authority behind discriminatory treatment based solely on color [it] is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment." *Burton* v. *Wilmington Parking Authority, supra,* 365 U.S. at 727 (dissenting opinion of Mr. Justice Frankfurter).

In short, the State is not insulated from responsibility under the Fourteenth Amendment merely because a private person commits the final act of invidious discrimination. The question, as Mr. Justice Clark has pointed out for the Court, is whether the State in any of its manifestations has, to some significant extent, become involved in the discrimination. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722.

B. In light of these principles, we consider whether the act of discrimination which lies at the base of the prosecution of the petitioners in *Lombard* can be said to be "private", rather than State-induced.

1. The segregationist policy of Louisiana is reflected in its laws. The scheme is not haphazard. Almost every activity is segregated. Discrimination against the Negro literally begins with his birth and continues to his death, and beyond.

At the outset, the Negro is given a birth certificate which so identifies him. La. R.S. 40:244. He starts life on a segregated street. La. 33:5066–5068. See also, La. R.S. 33:4771. As a child he is segregated in parks, playgrounds, swimming pools, and other recreational activities. La. R.S. 33:4558.1. If taken to the circus, he must go in by a separate entrance. La. R.S. 4:5. Until very recently, he was relegated to all-Negro public schools. Former La. R.S. 17:331–334, 17:341–344 (repealed in 1960).[42] Even now, he may attend a segregated school in the upper grades. See *Orleans Parish School Board* v. *Bush*, August 6, 1962 (C.A. 5). Later on, he will be compelled to stay apart at all entertainments and athletic contests. La. R.S. 4:452. Mixed social functions are absolutely banned. La. R.S. 4:451. At work, he will eat separately and use separate sanitary facilities. La. R.S. 23:971–975. His voting registration is separately tabulated. La. R.S. 18:195. And, should he become a candidate for elective office, he will be identified by race on the ballot. La. R.S. 18:1174.1. He may not marry outside

[42] Despite the contrary rulings of the federal courts the statute books of Louisiana are not yet wiped clean of provisions designed to forestall effective desegregation of the public schools. See, *e.g.*, La. R.S. 17:107, 17:394.1, 17:395.1–4, 17:2801, *et seq.*, 17:2901, *et seq.*

of his race. La. Civil Code, Art. 94; La. R.S. 9:201. See, also, La. R.S. 14:79. If he is divorced, the court proceedings will reflect his color. La. R.S. 13.917, 13:1219.

Institutions for the blind and deaf are segregated. La. R.S. 17:10–12. So are homes for the aged and infirm. La. R.S. 46:181. And prisons also separate the races. La. R.S. 15:752, 15:854. See, also, La. R.S. 15:1011, 15:1031.

Finally, his death will be attested by a certificate identifying him by race. La. R.S. 40:246. And he will be buried, presumably in a segregated cemetery,[44] perhaps under a funeral policy which has been separately administered. La. R.S. 22:337, 22:345.

Significantly, in this pervasive scheme of segregation, there seems to be special emphasis on separate consumption of food and drink. Employers are required to segregate their employees during meals, even to the point of supplying different utensils for each race. La. R.S. 23:972. Likewise, at all places of public entertainment, separate water fountains must be provided. La. R.S. 4:452. And, in New Orleans at least, strict segregation is required in all establishments which serve beverages with more than one-half of 1 percent alcohol. New Orleans City Code, §§ 5–2(1), 5–61.1. All appearances suggest that the leg-

[44] While there appears to be no specific statute segregating cemeteries, the practice seems to be required, at least in all publicly owned cemeteries, by the recent constitutional provision compelling segregation in all State, parochial or municipal institutions. See La. Const. 1921, Art. X, § 5.1, as added by Act 630 of 1960, adopted November 8, 1960.

islative policy of Louisiana includes segregation of public restaurants and lunch counters.

The statute books give no false impression. While compulsory segregation is far from new in Louisiana, neither are the present laws mere vestiges of a forgotten past. Many of the statutes are recent. None are ignored as obsolete. On the contrary, what remained of a more generous era (see *Hall* v. *DeCuir*, 95 U.S. 485) was quickly erased from the books. One relevant example is the repeal in 1954, shortly after this Court's initial decision in *Brown* v. *Board of Education*, 347 U.S. 483, of the local "inkeeper" statute and a companion provision specifically banning "distinction or discrimination on account of race or color" in licensed "places of public resort." See former La. R.S. 4:3–4, repealed by Act 194 of 1954.

Where the State's segregation policy has given away, it has been almost invariably under the compulsion of federal court orders, and then only after most protracted litigation. See *Wilson* v. *Board of Supervisors*, 92 F. Supp. 986 (E.D. La.), affirmed, 340 U.S. 909 (State law school); *Tureaud* v. *Board of Supervisors*, 116 F. Supp. 248 (E.D. La.), reversed, 207 F. 2d 807, judgment of court of appeals stayed, 346 U.S. 881, vacated and remanded, 347 U.S. 971, affirmed, 225 F. 2d 434, reversed and remanded on rehearing, 226 F. 2d 714, affirmed on further rehearing *en banc*, 228 F. 2d 895, certiorari denied, 351 U.S. 924 (State undergraduate and law school); *Morrison* v. *Davis*, 252 F. 2d 102 (C.A. 5), certiorari

denied, 356 U.S. 968, rehearing denied, 357 U.S. 944 (Buses and streetcars); *New Orleans City Park Improvement Ass'n* v. *Detiege,* 252 F. 2d 122 (C.A. 5), affirmed, 358 U.S. 54 (Municipal park); *Ludley* v. *Board of Supervisors of L.S.U.,* 150 F. Supp. 900 (E.D. La.), affirmed, 252 F. 2d 372, certiorari denied, 358 U.S. 819 (State colleges); *Dorsey* v. *State Athletic Commission,* 168 F. Supp. 149 (E.D. La.), affirmed, 359 U.S. 533 (Interracial sports contests); *Board of Supervisors of Louisiana State U.* v. *Fleming,* 265 F. 2d 736 (C.A. 5); (State university); *Louisiana State Board of Education* v. *Allen,* 287 F. 2d 32 (C.A. 5), certiorari denied, 368 U.S. 830 (State trade school); *St. Helena Parish School Board v. Hall,* 287 F. 2d 376 (C.A. 5), certiorari denied, 368 U.S. 830, further relief granted, 197 F. Supp. 649, affirmed, 368 U.S. 515 (Public schools); *East Baton Rouge Parish School Board* v. *Davis,* 287 F. 2d 380 (C.A. 5), certiorari denied, 368 U.S. 831 (Public schools). This Court is, of course, familiar with the course of the litigation involving the public schools of New Orleans. See *Bush* v. *Orleans Parish School Board,* 138 F. Supp. 337 (E.D. La.), leave to file mandamus denied, 351 U.S. 948, affirmed, 242 F. 2d 156, certiorari denied, 354 U.S. 921, denial of motion to vacate affirmed, 252 F. 2d 253, certiorari denied, 356 U.S. 969, further motion to vacate denied, 163 F. Supp. 701, affirmed, 268 F. 2d 78; *id.,* 187 F. Supp. 42, stay denied, 364 U.S. 803, affirmed, 365 U.S. 569; *id.,* 188 F. Supp. 916, stay denied, 364 U.S. 500, affirmed, 365 U.S. 569; *id.,* 190 F. Supp. 861, affirmed,

366 U.S. 212; *id.*, 191 F. Supp. 871, affirmed, 367 U.S. 908; *id.*, 194 F. Supp. 182, affirmed, 367 U.S. 907, 368 U.S. 11; *id.*, 204 F. Supp., 568, modified, 205 F. Supp. 893, modified and affirmed (C.A. 5), August 6, 1962.

As the State Legislature recently proclaimed, not only has Louisiana "always maintained a policy of segregation of the races," but "it is the intention of the citizens of this sovereign state that such a policy be continued." La. Act 630 of 1960, Preamble.

2. The statute books tell only a part of the story. Louisiana has a long tradition of racial discrimination, as is attested by the cases which have reached this Court. See, in addition to the cases already cited and those cited, *infra*, p. 70, *United States* v. *Cruikshank*, 92 U.S. 542; *Plessy* v. *Ferguson*, 163 U.S. 537; *Harmon* v. *Tyler*, 273 U.S. 668;" *Pierre* v. *Louisiana*, 306 U.S. 354; *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293. Even in areas where there is no specific statute, the custom of segregation persists. And, of course, customs often have a force akin to law. *Civil Rights Cases*, 109 U.S. 3, 16, 21; *Terry* v. *Adams*,

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" Louisiana's reluctance to abandon its tradition of segregation, even where this Court has ruled, is exemplified by the retention of the provision banning mixed communities in the 1950 codification of the laws still in effect, long after this Court's declaration that the statute was unconstitutional in *Harmon* v. *Tyler*. The Reporter for the revision notes that, since "[t]he state supreme court in its opinion [upholding the statute] had carefully distinguished or attempted to distinguish, the *Buchanan* case [*Buchanan* v. *Warley*, 245 U.S. 60, relied on by this Court]," and since this Court's ruling was "only a memorandum decision," the provision should be retained as still in force. See "Reporter's Notes" to La. R.S. 33:5066.

supra, 345 U.S. at 475 (opinion of Mr. Justice Frankfurter). Indeed, the Louisiana criminal courts are expressly enjoined to take judicial notice of extra-legal racial customs, presumably because they have legal relevance. See La. R.S. 15:422(6).

Specifically, a strict practice of segregation prevails in the service of food. As Mr. Justice Douglas noted in *Garner* v. *Louisiana*, 368 U.S. 157, 181 (concurring opinion):

> Though there may have been no state law or municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law. * * *

The custom had not changed when the present "sit-in" occurred. Both the Mayor and Police Superintendent of New Orleans frankly stated that they knew of no desegregated restaurant in the City.[45]

But segregation in restaurants is no mere *private* custom. If it were, it would doubtless have long since ceased to be the uniform practice. See *Cooper* v.

[45] We understand that since the granting of the petition in *Lombard* several department stores in New Orleans have desegregated their lunch counters. Of course, the partial desegregation of eating establishments at the present time does not disclose the situation when the discrimination at the base of these prosecutions occurred, two years earlier.

Aaron, supra, 358 U.S. at 20–21, 25, 26 (concurring opinion of Mr. Justice Frankfurter). It is actively supported by the outspoken policies of the State—policies so hardened that State employees are enjoined from advocating integration under penalty of losing their jobs. See La. R.S. 17:443, 17:462, 17:493, 17:523.

The State itself, apart from the enactment of compulsory legislation, sets the example. It segregates all of its own facilities. La. Const. 1921, Art. X, as amended 1960, § 5.1. It continues to discriminate in the electoral process. See *United States* v. *McElveen,* 180 F. Supp. 10 (E.D. La.), affirmed *sub nom. United States* v. *Thomas,* 362 U.S. 58; *United States* v. *Association of Citizens Councils of Louisiana,* 196 F. Supp. 908 (W.D. La.); *United States* v. *Manning,* 205 F. Supp. 172 (W.D. La.). See, also, *Hannah* v. *Larche,* 363 U.S. 420. Despite decisions in this Court, beginning with *Strauder* v. *West Virginia,* 100 U.S. 303, discrimination in grand jury selection persisted in New Orleans until at least 1954. See *Eubanks* v. *Louisiana,* 356 U.S. 584, 586. See, also, *Poret* v. *Sigler,* 361 U.S. 375. And efforts by Negroes to challenge segregation customs have been promptly met with prosecutions for breach of the peace. *Garner* v. *Louisiana,* 368 U.S. 157 (lunch counter customarily reserved for whites); *Taylor* v. *Louisiana,* 370 U.S. 154 (terminal waiting room customarily reserved for whites).

3. As indicated above, the inference that the State government causes and sustains the practice of segre-

gation in Louisiana restaurants seems unavoidable. In this instance, there were additional pressures by local officials.

Although the former New Orleans Mayor and the Superintendent of Police are men of moderation, whose utterances were restrained, their statements, quoted in full at pp. 12–15, *supra*, could not but harden the opposition to desegregation of lunch counters in the City. The timing of these official declarations was crucial.

It appears that, one week prior to the "sit-ins" here involved, the Superintendent of Police issued a public statement (*supra*, pp. 12–13), reprinted in the city's leading newspaper, which, in the context of Louisiana's laws and customs, must have been understood to condemn the efforts of the city's Negro citizens to achieve equality of treatment at lunch counter facilities not only by demonstrations but by any means. Terming the first "sit-ins" to have occurred in New Orleans "regrettable," the Superintendent claimed they were instigated by a "very small group" which did "not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population." The Superintendent appealed to "mature responsible citizens of both races" to "exercise * * * sound, individual judgment, goodwill and a sense of personal and community responsibility." Parents of the demonstrators were asked "to urge upon these young people that such actions are not in the community interest." Perhaps most significant, the Superintend-

ent saw "no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans." In the existing environment this exhortation can hardly have been understood to be confined to illegal demonstrations; it obviously supported the notion that proprietors should continue to refuse service to Negroes, for the normal traditional pattern of race relations with respect to food service, as the Mayor and Superintendent testified, was that proprietors would not serve Negroes on an integrated basis.

Four days prior to the "sit-ins," the Superintendent's statement was buttressed by a statement issued by the Mayor (*supra*, pp. 13–15) also published in the press. The Mayor declared that he had "directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted." This command was not restricted to demonstrations involving refusals to leave after being requested to do so. It acknowledged no room for free private decisions by the owners of lunch counters, no opportunity for Negroes to seek service in the hope that the owners would abandon segregation. It was also a direct prohibition upon lawful peaceful picketing (Cf. *Thornhill* v. *Alabama*, 310 U.S. 88) designed to encourage proprietors to serve Negroes on an integrated basis. The Mayor stated that he would enforce his directions by invoking two recent enactments of the State legislature prohibiting acts which could "foreseeably disturb or alarm the

public." Finally, he demanded that "such demonstrations cease" in the "community interest."

The foregoing statements read in isolation might fairly be construed to deal only with "sit-in" demonstrations. However, their combined effect in the Louisiana context, we submit, was not only to discourage "sit-ins" but to condemn the goal of equality of service and any activity intended to persuade the proprietors of public eating-places to cease segregation. Their impact upon those who might otherwise have acceded to the demands for equality of treatment seems plain.

4. We return to the question whether the total body of State influences—the manifold current segregation laws and contemporaneous declarations of policy, the customs stemming therefrom and the declarations of the mayor and chief of police—should be found to have played the same decisive role in the proprietors' discrimination against petitioners Lombard *et al.* as the municipal ordinances were seen to play in the companion cases previously discussed. See pp. 50–59 *supra*. The situations differ in that the Louisiana laws did not literally require the segregation. They are the same in that on this record one can only conclude that Louisiana's official actions must have been effective inducing causes of the proprietor's choice. Under these circumstances, too, normal human experience teaches that the individual proprietor would never face the problem of forming a judgment uninfluenced by State policy. The State which enacts unconstitutionally discriminatory laws in areas so

closely related to segregation in public eating-places and which declares generally that racial segregation is the policy of the State has the same burden of disentangling its influence upon the proprietors' discrimination from other factors for which the State is not responsible. And there is the same burden to show petitioners' awareness that the segregation was the result of the proprietor's individual choice uninfluenced by State action, if indeed that were the truth.

In the present case, we are not left merely to inference and presumption. Far from overcoming the conclusion that the exclusionary practice stemmed from the State, the testimony of the store manager confirmed it. Although his testimony on this subject was curtailed at the trial (see *supra*, pp. 17–19), the manager pointedly declared (*supra*, pp. 16–17) that he refused petitioners service because of "local tradition, law and custom."

Louisiana's official segregation policies are also related to petitioners' convictions for criminal trespass by their inevitable effect upon the police, the prosecutors and the State courts. Louisiana's policy, like the segregation-in-public-eating-places ordinances discussed at pages 49–59 *supra*, interjected an official discriminatory bias into the decisions of the police in the handling of complaints, into the decision of the prosecutor as to whether to institute criminal proceedings and, quite possibly, into the sentence. This impact of the segregation policies in the criminal proceeding confirms our conclusion that the convictions violate

the Fourteenth Amendment because on these records they are inseparably part of the official State policy of denying Negroes equal protection of the laws.

In the present case, it is unnecessary to consider just how large a body of State laws would justify finding, in the absence of contrary proof, that the State is so involved in the proprietor's decision that it is barred from initiating a prosecution for criminal trespass. Each particular case must be individually decided by making a judgment upon the question of degree, and the smaller the body of State law the closer the case will fall to the dividing line. In the *Lombard* case the Louisiana statutes are current and the general State policy of segregation was declared by the legislature as recently as 1960. The problem that would arise if the statutes had been repealed and the private discrimination were only the result of community customs promoted by earlier State laws does not require consideration here. The currency and pervasiveness of the body of Louisiana's segregation laws and the plainness with which that policy is declared show that this case is well on the unconstitutional side of the dividing line.

5. We have argued above that the record utterly fails to overcome the strong inference that the proprietor's acts of discrimination were brought about by the State. Although the Louisiana Supreme Court has stated in its opinion (L. 147) that the decision to exclude Negroes was independently made by the store owner, we find no supporting evidence for this conclusion. The manager did testify that, so far as the

national chain was concerned, the determination was left to him. And, obviously, it was he who actually established the segregated eating accommodations and maintained them separate. But the courts below gloss over the manager's explanation why he acted as he did. So far as he was permitted to explain, he said he was following prevailing "local tradition, law and custom," as he interpreted it. Further cross-examination on this point was cut off. Clearly, this statement does not support the conclusion that he made a purely private decision.

We think this evidence unambiguous against the background already sketched. For, as we have said, having intruded so actively and so pervasively in the area of race relations, the State had to overcome the presumption that it participated in the act of discrimination at the base of these prosecutions. And, certainly, Louisiana has not met that burden, at the trial or elsewhere. But the result here would not be different if the Court should disagree and hold that the shoe was on the other foot. For, if petitioners bore the burden of proving the State's involvement, they were at least entitled to an opportunity to make that showing. And, if they have failed to satisfy this Court, it is only because their efforts in this direction were summarily cut short.

As the court below confirms, petitioners "sought to introduce evidence to establish that the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers * * *" (L. 146). But the trial court refused that evidence. To cite one example, during the questioning of the store manager,

petitioners' counsel asked: "Will you tell the court why you were not allowed to serve them?" (L. 109). After an objection by the prosecutor was sustained on the ground that the question was not material, defense counsel stated the purpose of his inquiry (L. 110):

> I think it is material, because if Mr. Graves [the restaurant manager] felt there was some State policy that prevented him from serving these defendants this is a clear state action. * * *

Nor is this an isolated instance. Consistently, during the preliminary hearing on the motion to quash and during the trial itself, the trial judge prevented inquiry as to why the restaurant discriminated (L. 23, 25, 26, 107, 108, 127–128). The court having imposed upon them the burden of proving the State's involvement, this curtailment of petitioners' attempt to show that the store's decision to discriminate was attributable to the State was clearly improper. It follows that the *Lombard* convictions would have to be reversed even if the burden of showing whether the State's active support of segregation actually influenced the proprietor was upon the petitioners rather than the State.

III

THE DECISION IN THESE CASES SHOULD NOT BE DETERMINED BY CONSIDERATIONS PERTINENT SOLELY TO RIGHTS AS BETWEEN THE PROPRIETORS AND PETITIONERS

We have considered thus far the issues as between the petitioners and the States, and have shown that upon these records it must be concluded that the

States were sufficiently responsible for the discrimination to make their total action in relation to the petitioners' sentences—the inducement to discriminate plus the prosecution, conviction and sentences—a denial of equal protection of the law. In other words, a State may not, consistently with the Fourteenth Amendment, both induce a proprietor to engage in racial discrimination and prosecute the victims for criminal trespass or a similar offense.

The question may be raised, what are the mutual rights and duties of the petitioners and proprietors in the context of an ordinance requiring, or State action strongly encouraging, racial segregation. It may be argued, in attack upon our position, that reversal upon the grounds we urge would require holding the proprietors to a duty to serve Negroes and denying them private right to exclude them for whatever personal reasons they chose, a result inconsistent with the preservation of the private freedom of choice, sustained in the *Civil Rights Cases* and our ensuing constitutional history. The Negroes' remedy, the argument would conclude, is by direct attack upon the unconstitutional ordinances and official segregation policies rather than the proprietors' private freedom to discriminate.

We believe that this line of inquiry need not be fully explored because a decision in the present cases upon the ground put forward in this brief need not determine the private rights as between proprietors of public eating places and Negroes seeking service.

In the first place, there is no need to decide here whether even a criminal prosecution would violate the Fourteenth Amendment if it were made to appear as a fact that the proprietor's discriminatory practice was not a result of State action but of a personal wish to discriminate which would have been indulged in the absence of the State laws. On the records before the Court, this is not the fact. Obviously, the decision, then, cannot affect rights in private litigation in which the fact is made to appear.

Second, the presumption that the State law has influenced the private decision—a presumption which operates against the State in a criminal prosecution—might not operate in the same fashion against the private owner. The State, having adopted unconstitutional segregation laws, has a duty to disentangle the consequences; it does not lie in the State's mouth, at least in the absence of clear proof, to say that the very discriminatory practices that it ordered or otherwise sought to induce were actually unrelated to the State's directions or encouragement. This reasoning, however, would not run against the individual proprietor and consequently, as between him and the Negro, the outcome of any litigation might be different.

Third, we submit that there is no reason, in the circumstances of these cases, why the ability of the State to prosecute must be exactly the same, both substantively and procedurally, as the right of private owners to refuse service and exclude the Negro who

insists upon service. It is one thing to say that a State which enacts a law requiring segregation in public eating places is guilty of denying Negroes equal protection of the laws not only when it enforces that statute against them, but also when it prosecutes them for criminal trespass because of the decision of those who are apparently obeying the statutory command. That conclusion follows because the segregation laws cannot be so rigidly separated from the criminal prosecution; the prosecution, at least until the contrary is clearly demonstrated, is not only State action but a consequence, and therefore part and parcel, of the concurrent denial of equal protection of the laws. It is quite a different thing, however, to deprive the owner of any property rights which he may independently wish to exercise, on the ground that the State has violated the Fourteenth Amendment. Because of this difference the disposition of these criminal cases need not affect the private rights of proprietors and those seeking restaurant service, and those rights would remain to be determined whenever the issue may arise.

Under the facts of these cases, there is no serious incongruity in suggesting that the proprietors have not necessarily lost their right of action or defense in private suits merely because the State is constitutionally barred from implementing their discrimination through the imposition of criminal sanctions. The problem, if any, is confined within a narrow compass, and it is curable. We espouse no broad

rule of constitutional law which would, in all cases, deny the storeowner who wished to discriminate among customers the aid of the State criminal law. That might be the result if it were held that a State violates the Fourteenth Amendment merely by arresting and prosecuting those who trespass upon segregated premises. But we present no such question. Our contention is that, in cases like those at bar, the arrests and prosecutions violate the Constitution because the State itself has been a party to the underlying discrimination. To regain its neutrality and remove the only barrier now urged against its action, it suffices if the State terminates its objectionable inducement of discriminatory practices.

In summary, we submit that when the State, by its current laws, actions, and policies, brings about individual acts of discrimination in the conduct of a business open to the public at large, it cannot impose criminal sanctions upon those who have been excluded, on the theory that it is merely implementing a private property right. Americans, both black and white, may stand upon a more fundamental right: The right that government shall deny to no man the equal protection of the laws.

CONCLUSION

For the foregoing reasons, the judgments of conviction in these cases should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
BURKE MARSHALL,
Assistant Attorney General.
RALPH S. SPRITZER,
LOUIS F. CLAIBORNE,
Assistants to the Solicitor General.
HAROLD H. GREENE,
HOWARD A. GLICKSTEIN,
RICHARD K. BERG,
ALAN G. MARER,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 71

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT, AND ROSE MARIE COLLINS, PETITIONERS,

versus

CITY OF GREENVILLE, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF RESPONDENT

THOMAS A. WOFFORD,
THEODORE A. SNYDER, JR.,
200 Masonic Temple,
Greenville, South Carolina,
W. H. ARNOLD,
City Attorney,
Lawyers' Building,
Greenville, South Carolina,
H. F. PARTEE,
Assistant City Attorney,
Lawyers' Building,
Greenville, South Carolina,
Attorneys for Respondent.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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IN THE

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No. 71

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT, AND ROSE MARIE COLLINS, PETITIONERS,

versus

CITY OF GREENVILLE, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

Petitioners were convicted of trespassing upon their refusal to leave a lunch counter after the elapse of a reasonable time for their departure. Their original presence was for the purpose of a demonstration to protest the refusal of service to them. The premises and business where the events occurred are privately owned.

I

Does the operator of a privately owned restaurant or lunch counter open to the public have a right to refuse service to prospective customers?

II

Was there any "state action" in the refusal of lunch counter service to Negro petitioners by a private entrepreneur, and their prosecution for trespass upon failure to leave the premises after notice to depart?

III

Were petitioners denied the freedom of speech secured to them by the Fourteenth Amendment when they were convicted for trespass for refusing to obey the order of the manager to leave the lunch room of a Kress' Store where they desired to conduct a demonstration?

IV

Does a statute making it an offense to remain on premises after notice to leave is given deprive petitioners of Freedom of Speech where the statute does not require the person giving the notice to establish his authority over the premises?

STATEMENT OF THE CASE

S. H. Kress and Company operates a chain of variety stores, with a branch in Greenville, South Carolina, described as a junior department store. (R. 20.) One of its departments is a lunch counter, with seats for fifty-nine persons. (R. 25.) On the morning of August 9, 1960, the petitioners, all Negroes, took seats there and requested service. (R. 36.) They were told that Negroes were not served there. (R. 36.) Following that the manager had the lights turned off, announced that the lunch counter was closed, and requested everyone to leave. Everyone left except the petitioners. (R. 19, 44.) They did not leave. After approximately five minutes, they were arrested for trespass in violation of Section 16-388, Code of Laws of South Carolin, 1952, as amended. (R. 19.)

The petitioners were refused service because they were Negroes. The Kress headquarters has a policy of following local customs in reference to serving members of the public and the local manager acted pursuant to orders to that effect (R. 21), the local custom being to serve whites only.

The petitioners were subsequently convicted of trespass and sentenced. (R. 47.) On appeal the convictions were affirmed, first by the County Court of Greenville County (R. 52) and then by the Supreme Court of South Carolina. (R. 59.) The case is now before this Court on Certiorari. (R. 65.)

ARGUMENT

I

The proprietor of a privately owned restaurant has the right to serve only those whom he chooses and to refuse to serve those whom he desires not to serve for whatever reason he may determine.

At common law, proprietors of private establishments had the absolute right to serve whom they pleased. They were under no obligation to the general public, and had no duty to serve all who sought their services. At common law restaurants were such private establishments, and today, in the absence of statute, their owners may select their clientele upon any basis they desire. *Alpaugh v. Wolverton*, 184 Va. 943, 36 S. E. (2d) 906 (1946). There is no statute in South Carolina which changes the rights of a restaurant operator or imposes any duty on him to serve all who present themselves for service. The manager of Kress' store was fully within his rights when he refused to serve the petitioners at the lunch counter in that store.

This was not the rule as to all callings at common law. The innkeeper was treated differently. Innkeeping was regarded as a public calling, and innkeepers were under a duty to serve all who sought their services. The reason for

this distinction is explained by Beale, "The Law of Innkeepers and Hotels," 1906. According to Beale, the inn developed to serve the needs of the traveler in medieval England. Night-time travel was dangerous, and the condition of the roads made frequent stops necessary. Without closely spaced inns, travel would have been impossible. The needs of the wayfarer were entirely different from those of the local population, and the duties owed to each differed accordingly. The difference between the duties of the establishments set up to accommodate these diverse needs is illustrated by Beale as follows:

> "The one was instituted for the weary traveler, the other for the native; the one furnished food that the traveler might continue his journey, the other furnished drink for the mere pleasure of neighbors; the one was open to the traveler for protection at night; the other turned its guest out the very moment when he most needed protection and left him to find it, if his remaining senses permitted him to do so, in his own home. It is unnecessary, therefore, to point out the fact that a tavern is not an inn, and the innkeeper's duties do not extend to the tavernkeeper." As quoted in *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P. (2d) 773 (1944).

The obligations placed on inns and innkeepers at common law was not applied to restaurants. *Horn v. Illinois Central Railway Co.*, 327 Ill. App. 498, 64 N. E. (2d) 574 (1946) *; *Noble v. Higgins*, 95 Misc. 328, 158 N. Y. S. 867 (1916); *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (Md. 1960), affd. 284 F. (2d) 746 (4th Cir. 1960).

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* This Court later held that a restaurant which is operated as an integral part of a bus company's interstate transportation service must be operated without discrimination, but in so holding refused to hold that rule applicable to restaurants such as the one here concerned:

> "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act." *Boynton v. Virginia*, 364 U. S. 454.

A restaurant is treated the same in law as the store, where there is no obligation on the storekeeper to sell, and no obligation on the part of the general public to buy. *United States v. Colgate & Co.*, 250 U. S. 300.

With the exception of innkeepers and common carriers, public utilities, and the like, who operate by virtue of a franchise from the state, operators of businesses catering to the public have the right to select their clientele, and to make such selection based on any reason, or no reason at all.

Nor are restaurants the only enterprises to which this rule of law has been applied. A theater may refuse admission to anyone who desires entrance. *Collister v. Hayman*, 183 N. Y. 250, 76 N. E. 20 (1905); *People ex rel. Burnham v. Flynn*, 189 N. Y. 180, 82 N. E. 169 (1907). In *Woollcott v. Shubert*, 217 N. Y. 212, 111 N. E. 829 (1916) a theater owner was upheld in excluding a drama critic whose reviews were not favorable. The Court said:

> "His [the proprietor's] right to and control of it is the same as that of any private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded."

The operators of race tracks have the same common law right to choose their customers. *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, 57 A. (2d) 335 (1948); *Watkins v. Oaklawn Jockey Club*, 86 F. Supp. 1006 (W. D. Ark. 1949), aff'd., 183 F. (2d) 440 (8th Cir. 1950); *Garifine v. Monmouth Park Jockey Club*, 29 N. J. 47, 148 A. (2d) 1 (1959); *Madden v. Queens County Jockey Club*, 296 N. Y. 249, 72 N. E. (2d) 697 (1947), cert. den., 332 U. S. 761.

A ferry operator who is not engaged in general carriage has the same right. *Meisner v. Detroit B. I. & W. Ferry Co.*, 154 Mich. 545, 118 N. W. 14 (1908). In that case the court recognized that it was just by discrimination that the ferry company secured the type of patron and conse-

quently the financial benefits necessary to make its operations a success. What is true of the ferry business is true of many others. They depend on the patronage of a particular class of patrons. Many businesses succeed because they cater to the particular desires of a small class of persons. The existence of individual preferences and desires is a fact of the economic give and take of business and one on which its success is often based. The economic realities of operating a business open to the public make it necessary for survival that the operator have the right to select his customers. For example, it is reasonable that a restaurant operator be able to require his men patrons to wear coats, no matter how clean or neat their appearance might be otherwise, *Fred Harvey v. Corporation Commission of Oklahoma,* 102 Okla. 226, 229 P. 428 (1924), or for a dance hall proprietor to refuse admission to persons wearing uniforms, as was done in *Buenzle v. Newport Amusement Association,* 29 R. I. 23, 68 Atl. 721 (1908).

Petitioners, and others, had an implied license to go into the Kress store. The general law on this point is summarized in the annotation, 9 A. L. R. 379, as follows:

> "It seems to be well settled that although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual and to eject such individual from the store if he refuses to leave when requested to do so."

In this case when the petitioners were requested to leave the lunch counter, their implied license was revoked. They no longer had any right to remain there, rather, they were under a duty to depart. If they did not leave peaceably after being given a reasonable opportunity to do so, the management had the right to use such force as would be necessary to effect their removal. *Brookside-Pratt Mining Co. v. Booth,* 211 Ala. 268, 100 So. 240 (1924); *Marrone v.*

Washington Jockey Club, 227 U. S. 633 (1913). Five minutes was certainly a reasonable time for them to leave, where they had nothing more to do than stand up and walk away. By refusing to leave when requested, the petitioners became trespassers, and invited the use of force to accomplish their removal. The petitioners were in a place where they had no right to be and where they knew they were not wanted and had no right to remain. They cannot now object to their removal from that place by forceable means.

II

There was no state action and consequently no denial of the equal protection of the laws secured by the Fourteenth Amendment in the refusal of lunch counter service to the Negro petitioners by a private entrepreneur and their subsequent prosecution for trespass upon failure to depart from the premises after being requested to leave and given ample time to do so.

It is state action which results in denial of the equal protection of the laws which is prohibited by the Fourteenth Amendment. Private conduct, no matter how discriminatory, is not unlawful under that Amendment. *Civil Rights cases*, 109 U. S. 3; *Shelley v. Kraemer*, 334 U. S. 1. Nothing transpired in the case at bar which can be called state action by the State of South Carolina.

The management of Kress' store, in refusing service to petitioners and requesting them to leave was acting purely on a business choice made by a corporate management located outside the state. The manager testified positively on this as is shown by the record:

> "Q. What is the policy of Kress', Greenville, South Carolina store with regard to serving Negroes and whites at its lunch counter?
>
> "A. We follow local customs.

"Q. Now, sir, 'we follow local customs,' is that orders from your headquarters?

"A. Yes, sir.

"Q. It is?

"A. Absolutely.

"Q. And you understand as the manager of Kress' assigned to Greenville and possibly in other areas that it is one of the mandates of your national organization business chain to follow local custom with reference to serving members of the public?

"A. That's correct." (R. 21, 22.)

And on cross examination:

"Q. Do I understand then further that you are saying that the presence of Negroes at your lunch counter was contrary to customs?

"A. Yes, sir.

"Q. And that is why you closed your lunch counter?

"A. Yes, sir, that's right." (R. 23.)

From this it is clear that the refusal of service to the petitioners was based on purely personal motives, dictated by the management of the Kress chain, relying on their best business judgment.

Much is said about an ordinance of the City of Greenville requiring segregation in eating places. (R. 49). This ordinance, however, could have had no part in causing refusal of service to the petitioners. The policy formulated at Kress national headquarters was obviously made without reference to this ordinance. We may assume that the manager of the local store would obey the orders issued by his national organization. If the manager was following his orders in refusing service to the petitioners, then he would have refused service to them regardless of the existence of this ordinance.

It is interesting to note that even counsel for the petitioners was not aware of this ordinance until it was men-

tioned during the course of the trial. (R. 11.) Even the police captain who went to the scene did not have this ordinance in mind (R. 11), he being of the opinion it was no longer in effect. (R. 17,) In any event this ordinance did not make the conduct of the petitioners unlawful. Its penalty was imposed on the operator of the eating place.

It is clear also that the action of Kress' manager was not required under this ordinance, assuming arguendo, that it is a valid ordinance. The discussion in the record was of a prohibition against colored and white eating at the same lunch counter. (R. 11.) A reading of the ordinance shows that it prohibits only furnishing meals to the two races at the same counter. The penalty is imposed on the operator of the lunch room. There is nothing in this ordinance which would require a lunch room operator to close his business; there is nothing here which would penalize him for failure to order such persons to leave. When the manager of Kress' store closed his lunch counter and ordered the petitioners to leave, he was not acting because of the positive command of any state or city law, and he was not acting for fear of any sanction he might incur because of failure to obey any such law. His action was dictated solely by his obedience to the orders of his national headquarters, formulated wholly without reference to the ordinance in question.

The arrest of petitioners by police and their conviction in the courts of South Carolina did not constitute state action. It has always been the law in South Carolina that a property owner, whether the property be his home or a place of business, has the right to order any person from the premises, regardless of whether that person originally entered as an invitee. *State v. Starnes*, 213 S. C. 304, 49 S. (2d) 209 (1948). The property owner here was entitled to forceably remove the petitioners if he had desired. *Brookside-Pratt Mining Co. v. Booth*, 211 Ala. 268, 100 So. 240

(1924). Furthermore, anyone ejected by no more force than is reasonable has no complaint, and cannot sue for assault and battery or trespass in the expulsion. *Marrone v. Washington Jockey Club*, 227 U. S. 633.

The use of force by the owner of one in control of property to eject trespassers is not a wise policy. It leads to injuries and sometimes death. It places a premium on force of numbers and physical strength. The rule of "might makes right" runs directly counter to the rule of law. The law of South Carolina at least favors the removal of recalcitrant trespassers by the forces of law rather than brute physical strength. *State v. Lightsey*, 43 S. C. 114, 20 S. E. 975 (1895). It should be unnecessary for a property owner to take the law into his own hands to remove a trespasser, when other, less violent means are available. Punishment by criminal prosecution is the favored way in law of dealing with them. Mr. Justice Black has stated:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off." *Martin v. City of Struthers*, 319 U. S. 41.

The manager of Kress' store was acting within the framework of the law when he requested the police to come to his store. And it is clear that the police were there at his request.

> "Q. Now, on August 9, when these young people were seated at your lunch counter, what did you do first?
>
> "A. The first thing I had one of my employees call the Police Department and turn the lights off and state the lunch counter was closed." (R. 22.)

It was not only proper, but desirable in the interest of law-abiding society, for the petitioners to be arrested by the police and brought to trial in the courts of justice.

This case is not like *Shelley v. Kraemer*, 334 U. S. 1. There is no state action in the resort to the state's courts, such as was found to exist in that case. In *Shelley v. Kraemer* there were fully executed contracts of sale of realty between a willing buyer and a willing seller in each instance. The court system of the states was resorted to there by third parties who sought to interfere and prevent the sales already mutually agreed upon. As stated by the court:

> "The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."

In the case at bar one link is removed from this chain. The petitioners are analogous to the willing purchasers in Shelley, and S. H. Kress and Company stands in a position analogous to the sellers. Here we have no outside party resorting to the courts to prevent their entering into a contract. Instead, we have the situation of an unwilling seller who refuses to sell and who has a right to refuse to sell, on the one hand, and petitioners, who are willing buyers, and who insist on buying, but have no right to buy, on the other hand. Instead of a consensual agreement, there was an absolute disagreement. It became proper when it appeared the disagreement could not be resolved peaceably for the police and the courts to prevent that disagreement from expanding into violence and to protect the property rights that had already been transgressed.

Shelley v. Kraemer struck down interference backed by state courts in agreements to transfer property. It does not prohibit state police and court action to protect prop-

erty rights where that does not interfere with some agreed upon transfer of property. It cannot be said from the facts of this case that there was any agreement of Kress to sell to petitioners that was prevented from being consummated. The facts show that the only certainty was that Kress would refuse to serve petitioners. That was the company policy as formulated at its headquarters and expressed in an order to the manager of the Greenville store. The petitioners had been refused service on several prior occasions. (R. 38.) Although they may have had conversations with the manager about not being charged, it was manifest that there could be no agreement about this on August 9, 1960, after he requested petitioners to leave. After the refusal of service and warning to leave, it should have been clear to petitioners that there could be no agreement that day. The arrest of petitioners after a reasonable time for their removal did not interfere in or prevent the receipt by petitioners of any luncheon service, nor did it interfere in their making a contract for any such service. The action of the state courts in convicting petitioners therefore did not deny them any rights to which they might otherwise have been entitled.

Discriminatory acts of a private individual taken pursuant to a custom are not state action which is prohibited by the Fourteenth Amendment. As this Court stated in *Shelley v. Kraemer, supra:*

> "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

Private action cannot be converted into "state action" for purposes of the Fourteenth Amendment unless it is based on some positive legislative pronouncement. One of the great attributes of the rule of law in civilized societies is its certainty. A society subject to the changeable whim of its ruler is not under any rule of law. Freedom is stifled

when action taken under yesterday's known edicts turns out to be unlawful under the next days' announcement. Progress and development cannot be planned unless the laws that will govern that progress and development are known. In this picture custom is on the side of whim and fancy rather than of certainty. If custom can be law, it will often be an unknown law. How will a citizen know when the similar conduct of several has reached such proportions as to be the expected conduct of everyone? How can a citizen know whether he is witnessing the coincidental concurrence of similar reactions to similar circumstances only, and not the concurrence of common reaction to a given situation? We submit that it is an impossible task to learn when a custom begins or when it ceased to be such.

Again customs may vary from place to place. Some customs may cover an area larger than a state, or even a nation. On the other hand a particular custom may not prevail throughout an entire state. How great a proportion of a state's territory would petitioners have a custom cover before they conferred upon it the force of law? Often conflicting customs will be found within a single state. Which of such conflicting customs would then have the force of law? The answer is clear. It is that a custom can never have the force of law.

The difference between law and voluntary custom was pointed out recently by the Fourth Circuit Court of Appeals when it said:

> "This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of state law, they do not furnish a basis for the pending complaint. . . . The

> customs of the people do not constitute state action within the prohibition of the Fourteenth Amendment." *Williams v. Howard Johnson's Restaurant*, 268 F. (2d) 845 (4th Cir. 1959).

This ruling was adopted with approval by the Court of Appeals for the District of Columbia in *Williams v. Hot Shoppes*, 293 F. (2d) 835, 840 (D. C. Cir. 1961), cert. den., 370 U. S. 925.

The licensing and regulatory powers of the State of South Carolina over the business of S. H. Kress and Company do not convert the operations of that business into state action. In these times, virtually every business is licensed and taxed. The interest of the government in obtaining revenue should not convert a private business into an arm of the state. Nor should its regulations in the exercise of its police power to secure the health and safety of the public. This has been the conclusion of all the courts to consider this question. Thus it was stated in *Watkins v. Oaklawn Jockey Club*, 86 F. Supp. 1006 (W. D. Ark. 1949), aff'd., 183 F. (2d) 440 (8th Cir. 1950):

> ". . . the fact that it operates the track under a license from the State Racing Commission does not make it an administrative agency of the State and does not render its actions in operating the track, and excluding or ejecting persons from the track, state action within the provisions of the Fourteenth Amendment and Section 43 of Title 8, U. S. C. A."

The common law requiring innkeepers to serve the public without discrimination was a law dictated in great part by circumstances. The law as applied to innkeepers was confined to exceptional callings where the needs of the public urgently required that the service be provided. An example of this today is the common carrier. The great multiplicity of restaurants and other public eating places today is a matter of common knowledge. The business of providing

meals to the public is not one which presents an urgent need for service to all. There is no necessity to equate such a business to that of a common carrier. Common carriers today are extensively licensed and regulated. But such licensing and regulation merely add to their duties. They do not change them. On the other hand, licensing and regulation do not convert private carriers into public carriers. *Rutledge Co-op. Ass'n v. Baughman*, 153 Md. 297, 138 Atl. 29 (1927); *Continental Baking Company v. Woodring*, 286 U. S. 352.

Another category of enterprise which is required to serve all without discrimination is the public utility. These businesses depend for their existence on a franchise from the state. It is clear, however, that the licensing and regulation of S. H. Kress and Company by the State of South Carolina is not the equivalent of a franchise. The argument that licensing of a race track amounted to a franchise depriving the track owner of the right to select its patrons was rejected in *Madden v. Queens County Jockey Club*, 296 N. Y. 249, 72 N. E. (2d) 697 (1947). On that point the court said:

> "Plaintiff's argument results from confusion between a 'license' imposed for the purpose of regulation or revenue, and a 'franchise'. A franchise is a special privilege, conferred by the State on an individual, which does not belong to the individual as a matter of common right. . . . It creates a privilege where none existed before, its primary object being to promote the public welfare."

Since the Kress corporation did not derive from the state the right to initiate and conduct their business, it remained a private enterprise, regardless of the fact that it was licensed and taxed. *Woollcott v. Shubert*, 217 N. Y. 212, 111 N. E. 829 (1916); *Collister v. Hayman*, 183 N. Y. 250, 76 N. E. 20 (1905). Even racing, which is so closely licensed and regulated as to be no longer a strictly private busi-

ness, and approaches being a monopoly, is not because of that regulation an arm of the State In spite of these close controls it retains its private character including the right of the proprietor to select his patrons at will. *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, 57 A. (2d) 335 (1948); *Garifine v. Monmouth Park Jockey Club*, 29 N. J. 47, 148 A. (2d) 1 (1959).

The argument that state licensing and inspection of restaurants was most recently considered and rejected by the Fourth Circuit Court in *Williams v. Howard Johnson's Restaurant*, 268 F. (2d) 845 (4th Cir. 1959).

III

Petitioners were not denied the freedom of speech secured to them by the Fourteenth Amendment when they were convicted for trespass for refusing to depart after being directed to leave the lunch room of a Kress' Store where they desired to conduct a demonstration.

The freedom of speech which is secured by the Fourteenth Amendment is the freedom of speech of the First Amendment which is an attribute of "liberty" which the Fourteenth Amendment prohibits states from depriving persons without due process of law. *Gitlow v. New York*, 268 U. S. 652; *Fiske v. Kansas*, 274 U. S. 380. The First Amendment provides:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

The prohibition of the First Amendment is specific, **no law** shall be made which abridges the freedom of speech. It is laws which attempt to restrict this liberty that are forbidden. There is no law of South Carolina in the present case which even remotely interferes with speech.

The clear and present danger test emerged in rulings on the validity of legislative enactments which seemed to

restrict the freedom of speech. That rule requires that before an utterance prohibited by law can be penalized by the government, it must have occurred in such circumstances or have been of such a nature as to create a clear and present danger that it would bring about substantive evils which the government had the right to prevent and sought to do by the law in question. *Schenck v. United States*, 249 U. S. 47. But even that rule is not without limitation. Mr. Justice Holmes qualified it by saying:

> ". . . The First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language." *Frohwerk v. United States*, 249 U. S. 204.

The trespass statute in the present case has nothing to do with speech, and in no way restricts it. The statute declares certain property rights and that alone. There is no claim by petitioners and no proof of discriminatory application of the statute to them. *Yick Wo v. Hopkins*, 118 U. S. 356.

The constitutional purpose in proscribing legislation against free speech was to leave the arena open for free trade in ideas. It is implicit that such speech will be at the proper place and with the consent of the listener.

The right of freedom of speech is closely bound to the right of freedom of assembly. Of course, a man may speak what he desires in his own home. But in order for there to be any interchange of thoughts in an effort to convince, we must look to the public places. It is in the streets and parks where the freedom of speech reaches its full capabilities. There is the opportunity to find a diversity of opinions and the makings of a discussion of different views. The streets are the natural and the proper places for the dissemination of information and opinion. *Schneider v. State*, 308 U. S.

147; *Hague v. C. I. O.*, 307 U. S. 496; *Thornhill v. Alabama*, 310 U. S. 88. Even where the streets and parks are privately owned, as in company towns, citizens have a right to go there to communicate information, unimpeded by trespass laws. *Marsh v. Alabama*, 326 U. S. 501; *Tucker v. Texas*, 326 U. S. 517. Even speech on the streets and other public places is not without some liability to control. *Saia v. New York*, 334 U. S. 558.

When the place of speaking changes away from public property and the traditional areas of free interchange, the rights of those who would speak are altered. Property rights come into play. On private property the right of freedom of speech must yield to the property right of the landowner to eject trespassers. *Hall v. Commonwealth*, 118 Va. 72, 49 S. E. (2d) 369, (1948), app. dism. 335 U. S. 875, reh. den., 335 U. S. 912. In that case a conviction for trespass under a statute similar to the one here was upheld, where a member of a religious sect insisted on distributing information in the halls of an apartment building after being requested to leave. The court stated that these places could not be regarded the same as public roads. Hallways are not the proper place for public assembly, or for the discussion of public questions. *Watchtower Bible & Tract Society v. Metropolitan Life Insurance Company*, 279 N. Y. 339, 79 N. E. (2d) 433 (1948); *Commonwealth v. Richardson*, 313 Mass. 632, 48 N. E. (2d) 678 (1943).

A public store is not the proper place for discussion either. It is a commercial establishment, devoted to business uses. People do not ordinarily congregate there, nor do they resort to such a place to discuss the great and burning issues of the day.

The petitioners were not exercising any right of freedom of speech toward the proper persons. There is implicit in the idea of speech the idea of communicating informa-

tion. These petitioners were not attempting to publicize any argument they had to make. The purpose of picketing, which this resembles, is to inform members of the public of an existing state of affairs, usually a labor dispute. *Thornhill v. Alabama*, 310 U. S. 88. Here, however, there was no attempt or purpose to convey information to the public, or to seek to enlist public support or public sentiment in their favor. Just the opposite, the petitioners were conducting an argument with S. H. Kress and Company. They had a right to ask Kress' for service in these circumstances. That was the proper expression of their side of the argument. But they had no right to repeat their views over and over after the management had expressed its opinion by denying them service and requesting them to leave. When that exchange was ended, their rights of speech were ended, too. At that point the property rights of the Kress Company became paramount.

On the street, when a listener is accosted, he may choose to stop and talk or he may choose to turn away. When a man is in his home or on his property, however, he has no duty to leave and retreat. Such a person can require the would-be speaker to turn away, and if he does not, prosecute him for trespass. Further, to require the property owner to remain and listen in circumstances such as these, makes him a captive audience, and that deprives him of the same rights the petitioners would seek to assert. *Kovacs v. Cooper*, 336 U. S. 77. As Judge Edgerton stated in *Public Utilities Commission v. Pollack*, 191 F. (2d) 450 (1951), reversed, 343 U. S. 451:

> "One who is subjected to forced listening is not free in the enjoyment of all his faculties."

This case lacks the necessary element of a willing listener, without which there is no such thing as free interchange of ideas.

> "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners." Mr. Justice Reed in *Kovacs v. Cooper*, 336 U. S. 77.

There is another element in this case deriving from the occupation of seats by the petitioners and their refusal to give them up. The silent and forceful occupation of a private person's store is not speech. Such conduct smacks of coercion. It is a demonstration of force, not of reason. The threat of and use of force is not connected in any way with the idea of persuasion by words, thoughts and logic. To characterize the conduct of petitioners they were saying: "If you are not convinced by our talk, we will convince you by taking possession of your premises and denying you the use of them."

The denial of access to a person's property by strikers who are exercising freedom of speech is not lawful. *Carneige-Illinois Steel Corp. v. United Steelworkers of America*, 353 Pa. 420, 45 A. (2d) 857 (1946); *Truax v. Corrigan*, 257 U. S. 312. The right of free speech must yield in these circumstances to other rights. *N. L. R. B. v. Fansteel Metallurgical Corporation*, 306 U. S. 240, held further the seizure of a portion of an employers plant could not be justified under the N. L. R. A., even though the employer may have been engaged in unfair labor tactics, and the discharge of the employees who seized the buildings was upheld. Likewise, laboring men who seize a possession of a vessel in order to publicize a labor dispute and seek to gain advantageous terms in the bargaining are held to be ordinary trespassers, unprotected by any labor statute. *The Oakmar*, 20 F. Supp. 650 (Md. 1937); *Korthinos v Niarchos*, 175 F. (2d) 730 (4th Cir. 1949), cert, den., 338 U. S. 894. The right to freedom of speech does not carry with it the right to deprive another person of his property.

IV

Convictions for violation of a statute making it an offense to remain on premises after being requested to leave, although the statute did not require the person making the request to leave to establish his authority to issue such request, did not deprive petitioners of freedom of speech.

The statute in this case contained no words which were capable of several meanings, or which could be construed to prohibit legitimate acts. *Winters v. New York*, 333 U. S. 507. Statutes such as the one here under consideration are entirely different from the censorship-type statutes considered in *Smith v. California*, 361 U. S. 147, *Winters v. New York, supra, and Burstyn v. Wilson*, 343 U. S. 495. There was nothing here that could have different meanings to different people, or which would permit the application of an arbitrary standard.

To require a person in possession of land to identify his authority to a trespasser before he could take steps to eject him would make a mockery of the law. Ordinarily the possessor would be unable to prove this authority except by stating it verbally. What landlord carries his deed or lease in his pocket? The public record of deeds and leases is notice to the world of the owners and holders thereof. But many persons are in possession of property under oral leases, or under an implied lease, as tenants at will holding over at the end of the term, or tenants from month to month. What good and what point could be gained by having the person in possession state his claim is unclear. Looking at it from the viewpoint of the petitioners, and others who would trespass, it is clear that they always know about the absence of their own authority. There is no requirement in the law relating to larceny to which this is analogous, that the thief be instructed as to the ownership of what he is about to steal.

The rule of *scienter*, which the petitioners discuss, is wholly a different matter. *Scienter* is a question of the state of mind of the offender. The requirement of *scienter* is the requirement of a type of specific intent. *Scienter* or specific knowledge of the criminality of a specific act is not an essential element of every crime, nor does social justice require that it be included in every offense. For the case of statutory offenses, the intent required by the legislature must be proved in order to convict, but there is no requirement that intent of any kind be prescribed. As was stated in *United States v. Greenbaum*, 138 F. (2d) 437 (3rd Cir. 1943):

> "Whether allegation and proof of *mens rea* is requisite to a conviction of a crime which carries with it a possible sentence to penal servitude depends upon the legislative intent evidenced by the statute which defines and punishes the particular offense. *United States v. Balint*, 258 U. S. 250, 252, 66 L. Ed. 604, 42 S. Ct. 301. The constitutional requirement of due process is not violated merely because *mens rea* is not a required element of a prescribed crime."

Many common law crimes require only such a general criminal intent, for example, battery.

If *scienter* could be read into the requirements of this statute, it would not be the *scienter* urged by petitioners. It would not be necessary to satisfy the *scienter* requirement that the person in possession of property prove his authority to require others to leave. All that could possibly be required would be the conveyance to petitioners and persons like them of notice that someone other than themselves asserted the right of possession to their exclusion. Notice to the petitioners, and the notice required by the statute was ample to give petitioners the knowledge that a superior right to possession was being claimed. At that point, had they needed any further information as to the au-

thority of the person requesting them to leave, they were required to inquire as to his authority, or disobey at their peril. When a person in a position of apparent authority requested them to leave, they had the right to inquire of him as to the nature of his authority. Having failed to do that, we may assume they were satisfied by the appearances.

Assuming further that *scienter* is an element of the offense charged by this trespass statute, it is clear that as to these petitioners the requirement of *scienter* was met. At the outset of the trial, it was agreed that the facts and findings of one case would be the facts and findings of all:

> "Judge Jester: And the facts and findings of one case would be the facts and findings of all as far as the record is concerned?
>
> "Mr. Smith: [Willie T. Smith, one of petitioners' counsel] That is correct." (R. 6.)

The manager of the store in Greenville testified positively that he was the manager and that he requested petitioners to leave. (R. 19.) The only one of the petitioners to testify at the trial knew the person ordering them to leave was the manager as she had spoken to him over the telephone previously (R. 39) and she recognized him at the store at the time of the demonstration. (R. 37, 41.) No matter what interpretation is given the statute in this case, the petitioners have violated its terms and their conviction and punishment thereunder was proper.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

Respectfully submitted,

THOMAS A. WOFFORD,
THEODORE A. SNYDER, JR.,
200 Masonic Temple,
Greenville, South Carolina,
W. H. ARNOLD,
City Attorney,
Lawyers' Building,
Greenville, South Carolina,
H. F. PARTEE,
Assistant City Attorney,
Lawyers' Building,
Greenville, South Carolina,
Attorneys for Respondent.